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Sup. Court
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In The

Supreme Court of the United States

RONALD JOHNSON AND DEE JOHNSON,

Petitioners,

v.

CITY OF SHOREWOOD, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Williamson* jurisdictional requirement to exhaust state judicial remedies permit a federal court remedy when the state court final judgment awards nothing for a previously-adjudicated physical taking?

2. Whether 42 U.S.C. § 1983 jurisdiction exists for violation of Just Compensation Clause when a state court final judgment awards ZERO compensation for a previously-adjudicated physical taking?

3. Whether *Rooker-Feldman* doctrine applies when landowners did not have a reasonable opportunity to litigate Corps' and municipality's misrepresentations of pre-ownership Clean Water Act wetland in the state court condemnation proceeding?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Ronald Richard Johnson and Dee Lundberg Johnson; *Plaintiffs-Appellants.*

City of Shorewood, Minnesota and its Mayor in his official capacity; City of Minnetonka, Minnesota and its Mayor in her official capacity; Riley-Purgatory-Bluff Creek Watershed District, and the Chair of its Board of Managers in his official capacity; Trivesco, a partnership and its partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner & Koppelman, Inc., a corporation; Highland Villa Builders, Inc., a corporation; United States of America; Corps of Engineers, being sued as the Corps of Engineers of the United States; Louis Caldera, The Honorable Secretary of the United States Army or his successor in his/her official capacity; Joseph N. Ballard, Lt. General, the Commander-in-Chief of the Corps of Engineers of the United States or his successor in his/her official capacity; *Defendants-Appellees.*

CORPORATE DISCLOSURE STATEMENT

Plaintiffs as individuals state that Supreme Court Rule 29.6 does not apply because the plaintiffs are not corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported as *Johnson v. City of Shorewood*, 360 F.3d 810 (8th Cir. March 5, 2004). The court of appeals affirmed the district court's judgment but modified the holding to apply sua sponte *Rooker-Feldman* doctrine.

The district court judgments, orders, and related reports and recommendations from the U.S. Magistrate Judge, App. 18-49, are not reported. The district court in relevant part dismissed the 42 U.S.C. §§ 1983, 1985 takings claims against the defendants for lack of jurisdiction and dismissed the claims against the United States instructing the Johnsons to bring their takings claims against the United States in the U.S. Court of Federal Claims. App. 21-22.

After the U.S. District Court issued its order, the Johnsons commenced a complaint against the United States in the U.S. Court of Federal Claims ("COFC"). The COFC dismissed the Johnsons' takings claims in *Johnson v. United States*, Case 01-465L (November 4, 2003). App. 51-58. Final judgment was entered on April 5, 2004. App. 59. The Johnsons have appealed to the U.S. Court of Appeals for the Federal Circuit and requested a stay pending the U.S. Supreme Court's decision on this petition for writ of certiorari.

Prior to the U.S. District Court litigation, the Johnsons litigated in state court from 1991 to 2000. The court of appeals described the principal state court litigation as follows:

> Shorewood constructed a road berm, culvert, and pond-control structure along the southern boundary of the Johnson property. The pond-control

structure raised the bottom of the drainage ditch above its original elevation and created a pond near the southern boundary of the Johnson property. Based on the elevation of the pond-control structure, the Watershed District designated a 100-year storm event flood plain at an elevation of 917.1 feet above sea level and prohibited construction at elevations lower than 919.1 feet. *Johnson v. City of Shorewood,* No. 91-18099, at 4 (Minn. Dist. Ct. Aug. 17, 1993, Findings of Fact, Conclusions of Law, and Order for Judgment).

The Johnsons commenced state court litigation against Shorewood in 1991, alleging inverse condemnation under both the federal and Minnesota constitutions. The state court determined that the flood plain restrictions did not constitute a regulatory taking, but concluded that the pond and associated control structure had physically taken the Johnsons' property up to 914 feet above sea level because the pond would rise to that elevation during "major storm events." *Id.* at 5. Accordingly, the state court issued a writ of mandamus compelling Shorewood to commence condemnation proceedings for the purpose of acquiring a drainage easement on the Johnsons' property up to 914 feet above sea level. *Id.* The Minnesota Court of Appeals affirmed this judgment. *Johnson v. City of Shorewood*, No. CX-93-2452 (Minn. Ct. App. May 11, 1994), *review denied*, (Minn. July 15, 1994).

Shorewood instituted condemnation proceedings . . . The jury awarded the Johnsons $2,000 for the taking and $63,000 for clean-up costs. *The state court vacated the $2,000 takings award, however, in light of the jury's finding that the taking had not diminished the market value of the Johnsons' land* . . . The Minnesota Court of Appeals affirmed the judgment, holding that the $63,000 award was appropriate because the value of the Johnsons' property would have been

> diminished absent clean-up of debris caused by the flooding. *City of Shorewood v. Johnson*, No. C5-97-1525, 1998 WL 188561, at *1 (Minn. Ct. App. April 21, 1998).

App. 6-7 (emphasis added). Copies of the state court opinions or relevant excerpts are included in the appendix, App. 60-122. Final judgment in the state condemnation proceeding was entered in 2000. *Johnson v. City of Shorewood,* No. DC CD 2344 (Minn. Dist. Ct. Jan. 5, 2000 Notice of Entry of Judgment). App. 50.

JURISDICTION

The final judgment of the United States Court of Appeals for the Eighth Circuit was filed on March 5, 2004. App. 4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [U.S. Const. amend. V.]

The Fourteenth Amendment to the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws. [U.S. Const. amend. XIV, § 1]

Title 42, Section 1983 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. [42 U.S.C. § 1983 (2001).]

STATEMENT OF THE CASE

The Johnsons request that the U.S. Supreme Court consider clarifying its jurisdictional rule in *Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985) ("*Williamson*") and apply it in this case. In *Williamson*, the U.S. Supreme Court said a property owner "has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation" and that "the property owner cannot claim a violation of

the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195.

The Johnsons believe they have been "unsuccessful" and can claim a violation of the Just Compensation Clause – in the way *Williamson* defines it. The Johnsons have been "unsuccessful" by litigating for ten years in state court only to receive a state court final judgment awarding ZERO compensation for a previously-adjudicated physical taking of land. The state court judgment on its face violates the mandate of the Just Compensation Clause which provides, "[N]or shall private property be taken for public use, without just compensation." Awarding ZERO is a per se violation of the Just Compensation Clause.

Because of these circumstances, *Williamson* suggests 42 U.S.C. § 1983 jurisdiction exists for the Johnsons because the state court procedures did not require Shorewood to pay any compensation, i.e., nothing, to the Johnsons in exchange for their land.

The court of appeals did not apply this interpretation of *Williamson*, but deferred to the state court judgment under the *Rooker-Feldman* doctrine instead. *In so doing, the court of appeals has decided a fundamental and important jurisdictional question that has not, but should be decided by the U.S. Supreme Court. See* Rules of Supreme Court of the United States R. 10(c).

The court of appeals stated that *Rooker-Feldman* deference to state court judgments closed the door entirely on 42 U.S.C. § 1983 jurisdiction after a state court condemnation judgment:

> Finally, because the United States Supreme Court alone has jurisdiction to review state court decisions, the lower federal courts lack subject matter jurisdiction to consider federal claims that would vitiate an underlying state court judgment. *Lemonds*, 222 F.3d at 492; *see also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). With

the limited exception of habeas corpus actions, this principle, known as the *Rooker-Feldman* doctrine, applies whenever a federal claim would succeed only "to the extent that the state court wrongly decided the issues before it." *Simes v. Huckabee*, 354 F.3d 823, 827 (8th Cir. 2004) (*quoting Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring)) . . .

Many of the Johnsons' claims call upon us to consider issues identical to those on which the Johnsons have already obtained a state court decision, especially as against Shorewood. Although the district court mentioned our decision in *Lemonds*, it disposed of claims actually litigated in state court cases under principles of collateral estoppel. We believe the problem is more fundamental. To the extent the Johnsons' alleged constitutional injury stems from claims adjudicated in the prior state court judgment, the district court lacked jurisdiction under *Rooker-Feldman* because the Johnsons are essentially challenging the state judgment as inadequate and are "asking the federal court for the same remedy requested in the state court action: just compensation." *Gisslen v. City of Crystal*, 345 F.3d 624, 628 (8th Cir. 2003), *pet. for cert. filed*, No. 03-1141 (Feb. 4, 2004) . . .

The Johnsons argue that they were denied just compensation due to "misrepresentations" perpetrated in the state court proceedings – misrepresentations that they allegedly discovered after the fact. Whatever the validity of these allegations, *Rooker-Feldman* stands as a bar to federal review because the Johnsons' requested relief "would effectively reverse the state court decision or void its ruling." *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1065 (8th Cir. 1997). The Johnsons' remedy, if any, is to return to state court and utilize the procedures for remedying fraud. *See Johnson v. Smithsonian Institution*, 189 F.3d

> 180, 186-87 (2nd Cir. 1999). If the state courts deny relief, the Johnsons may seek review by the United States Supreme Court.

App. 14-15.

The Johnsons argue below that the court of appeals' decision contradicts a series of U.S. Supreme Court mandates. First, this Court in *Loretto v. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419 (1982) held that the federal Fifth Amendment requires all physical occupation takings – fraud or no fraud – be compensated. This Court concluded "that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426. This Court in *Lucas v. South Carolina Coastal Council* re-stated the same principle:

> We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. *In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation* . . . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

Id., 505 U.S. 1003, 1015-16 (1992) (citations omitted) (emphasis added). Later, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court confirmed, "The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal 'permanent physical occupation of real property' *requires compensation* under the Clause." *Id.* at 617 (emphasis added).

The Johnsons also argue that the court of appeals' decision conflicts with the decision of the court of appeals in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (1990) ("*Del Monte Dunes*"), *appeal after remand*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). *Del Monte Dunes* holds that federal jurisdiction existed when state procedures for compensation in California state court were inadequate. *Id.*, 920 F.2d at 1507 ("California's compensation procedures were inadequate when the alleged taking occurred, and appellants have established the ripeness of the compensation component of their regulatory taking claim."). In contradiction to *Del Monte Dunes*, the court of appeals found no federal jurisdiction even though Minnesota's compensation procedures proved inadequate for the Johnsons.

The court of appeals' decision also conflicts with the decisions of the U.S. Court of Appeals which have held that *Rooker-Feldman* doctrine did not apply to a previous state court judgment if the federal plaintiff did not have a reasonable opportunity to litigate the issues in state court. *See, e.g., Long v. Shorebank Development Corp.*, 182 F.3d 548 (7th Cir. 1999) ("*Long*"). In this case, the Johnsons could not have litigated the issue of the alleged pre-ownership Clean Water Act wetland fraud because the state court did not have subject matter jurisdiction over Clean Water Act determinations and lacked personal jurisdiction over the U.S. Corps of Engineers ("Corps"). Despite these facts, the court of appeals found that the previous state court judgment barred all of Johnsons' federal claims.

Finally, the Johnsons argue that federal jurisdiction in this case would be only a narrow exception to the *Rooker-Feldman* doctrine and would provide useful guideposts for both federal and state courts in future Fifth Amendment Just Compensation Clause proceedings.

Prior Proceedings

The Johnsons' primary allegation is that the appellees have, individually and in concert, effected a series of regulatory and physical takings – 1984 to 2002 and currently – while obstructing the state court to avoid paying the Johnsons any compensation for the takings. App. 4, 8.

The subject property, which the Johnsons purchased in 1981, is located within the City of Shorewood. App. 5-6, App. 113-15 (maps). It consists of three woody knolls separated by a flat, centrally-located field. App. 5-6. The field is diagonally bisected by a ¼ mile drainage ditch running from the northeast corner to the southwest corner.[1] Before 1984, water freely ran through the ditch and headed south from the Johnson property, ultimately emptying into Purgatory Creek. App. 113 (map of drainage ditch).[2] In 1980, prior to the Johnsons' purchase, the field was designated as a wetland on the National Wetland Inventory (NWI) map issued by the U.S. Fish and Wildlife Service. The Johnsons disputed the NWI map because of their personal knowledge the land was dry, ditched-and-drained farmland before the dam and dumping caused the flooding and because the NWI map is based on subjective and out-of-date U.S.G.S. topography and aerial photography. *Id.*, App. 133-35. The Johnsons also have undisputed expert's reports on hydrology and vegetation confirming their personal observations of pre-dam dry land. App. 136-152.

After the Johnsons purchased the property, the combination Shorewood and private developers (Trivesco) began developing land to the south and west. App. 6. Dubbed "Waterford," the resulting subdivision required the

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[1] The obvious purpose of the ditch excavation in the 1950's was to convert any possible wet land to dry land.

[2] The Johnsons allege that they possess common law riparian rights to natural, downstream drainage.

installation of roads and utilities. In 1984, Shorewood and Trivesco obtained the consent of the Corps to install the roads and utilities under an existing Clean Water Act nationwide permit that authorized the filling of "headwaters wetlands." *Id.*[3] Later, the Watershed District issued a permit for the work. *Id.*[4]

Shorewood constructed a road berm, culvert and culvert inlet water level pond "control structure", i.e., ditch "dam", along the southern boundary of the Johnson property. *Id.*[5] The dam raised the bottom of the drainage ditch twelve feet above its original elevation and created a pond near the southern boundary of the Johnson property. App. 97-101. This permanent flooding resulted in no benefit to the Johnsons, but only adverse impacts. App. 101.[6] Based on the design of the pond-control structure, the Watershed District designated a 100-year storm event flood plain at an elevation of 917.1 feet above sea level and

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[3] The Corps issued two (2) separate permit determinations a month apart. Both permits were issued on *preliminary* Waterford plans for a free flowing road culvert in violation of its articulated policies to only approve final plans. Final plans included the above-described dam – not a free flowing road culvert. *See National Wildlife Federation v. Marsh*, 721 F.2d 767, 785-86 (11th Cir. 1983), citing *Vermont Yankee Power Corp. v. National Defense Counsel, Inc.*, 435 U.S. 519, 543-44 (1978).

[4] The Watershed District permit issued on new, final and revised Waterford stormwater utility plans prepared after the Corps' two permit determinations. The damming and dumping violates the Corps' 33 C.F.R. Part 330 permit "Special Conditions of Nationwide Permits", in particular the permit "Management Practices", 330.4(b)(6), 5(a)(4) which required the avoidance of "adverse impacts on the aquatic system." If no such avoidance, the regulations required an individualized Corps' review of the Waterford project – not done.

[5] The pond was for both "aesthetic reasons/purpose" (private use) and for the collection of storm water from adjoining subdivisions (public purpose). App. 98, findings of fact no. 8.

[6] The pond is, in reality, Johnsons' drainage ditch overflowing its banks even in fair weather.

prohibited construction at elevations lower than 919.1 feet.[7] *Johnson v. City of Shorewood*, No. 91-18099, at 4 (Minn. Dist. Ct., Aug. 17, 1993, Findings of Fact, Conclusions of Law and Order for Judgment). App. 96-108.

The Johnsons commenced their state court litigation against Shorewood in 1991, alleging inverse condemnation under both the United States and Minnesota constitutions. App. 6. The Johnsons alleged that the dam and dumping and resulting flooding restricted the highest and best use the land could ever be put – development and construction of residential homes. *Id.* The building restrictions at 919.1 feet make approximately 11 acres of Johnsons' 20 acres previously-developable property undevelopable. *Id.* The Court should take judicial notice that currently developable land in Shorewood – a relatively affluent Minneapolis suburb bordering Lake Minnetonka – sells for approximately $100,000 per acre.

The state court determined that the 917.1 foot flood plain restrictions did not constitute a separate regulatory taking, but concluded that the damming and dumping had physically taken the Johnsons' property up to at least the 914 feet above mean sea level (MSL) because the ponding would rise to that level during "major storm events." App. 6-7. Accordingly, the state court issued a writ of mandamus compelling Shorewood to immediately commence condemnation proceedings for the purpose of compensating the Johnsons for the taking up to 914 feet MSL – the 914 foot flood plain. App. 7. In short, the Court found that the elevation of water in Johnsons' ditch was raised 12 feet – from 902 feet to 914 feet. *Id.* The Minnesota Court of

[7] This designation was based on the ultimate level of forecast new flooding using the property as a regional storm sewage dump and impoundment basin including for new, adjoining parcels not yet developed.

Appeals affirmed this judgment. *Johnson v. City of Shorewood*, No. CX-93-2452 (Minn. Ct. App. May 11, 1994), *review denied* (Minn., July 15, 1994). App. 92-95.

The state court reserved, by declining to decide, the pre-damming wetland issue. App. 97, Finding of Fact no. 3. Undoubtedly, this was done because the state courts have no personal jurisdiction over the Corps and no subject matter jurisdiction under the Clean Water Act § 404, 33 U.S.C. § 1344 ("Clean Water Act"). *Compare* App. 113, 114. *See*, App. 133-52. Whether property was a pre-existing wetland goes to the condemnation damages – which is the condemnation market value of the highest and best use to which the property could be put before and after the taking.

Shorewood ultimately instituted condemnation proceedings in 1994. App. 7. The Court appointed commissioners who in turn awarded the Johnsons $2,000 for the easement and $3,000 for "cost to cure" damages. App. 61. The $2,000 award was based solely on real estate comparables that were Clean Water Act wetlands. Not satisfied, the Johnsons requested a jury trial, a right codified by Minn. Stat. § 117, et seq. App. 61.

The Johnsons' property right to federal Fifth Amendment just compensation went unrealized at the jury trial in 1996. App. 61. Prior to the jury trial, the state court held that the Johnsons were collaterally estopped from presenting evidence contrary to the erroneous pre-ownership National Wetland Inventory wetland designation:

> Because the issue concerning the pre-ownership wetland designation relating to the Property, and the issue concerning the City's conditions for plat approval, were already adjudicated [in the first state proceeding] . . . upon a motion for summary judgment the doctrine of collateral estoppel clearly precludes the introduction of evidence or argument [to the] . . . contrary.

App. 90 – *City of Shorewood v. Johnson*, No. CD-2344 (Minn. Dist. Ct., Oct. 10, 1996, Memorandum and Order). *See*, App. 7 n. 6.

Thus, at the jury trial, the Corps' jurisdictional wetland misrepresentation was presented as uncontested fact in state court by City of Shorewood wetland expert Ronald P. Peterson. The highlights of Peterson's testimony relating to the fraud are as follows:

> Q. OK. Now, as I understand your testimony, you think that – you will agree that if the Johnson property was not – was not a wetland before the taking and is now a wetland, you would agree that the Johnsons have sustained damage, would you not?
>
> A. Yes.
>
> Q. OK. We'll write damage (indicating) pretaking, wetland – Oh, no. Wetland and after wetland. Under those circumstances, you would agree that Mr. Johnson – that the Johnsons have sustained damage. Correct?
>
> A. Correct.
>
> * * *
>
> Q. You're aware that the Corps of Engineers has not asserted jurisdiction over this property, are you not?
>
> A. They most certainly have.
>
> * * *
>
> Q. And what language in those letters specifically leads you to believe that the Corps believed that Johnsons' property was a wetland?
>
> A. Well, there are three letters. One is February 7, 1994, one is from March 2nd, 1993, one is from March 17th, 1993.
>
> * * *
>
> Q. Is it your testimony that all of this area was and is wetland?
>
> A. Yes.

App. 72-73, 77, 82. The three Corps' letters and their CWA wetland conclusions were not based on ground truth. App. 123-32. The CWA wetland determination was based on an inaccurate and erroneous 1980 NWI map issued by the United States Fish and Wildlife Service.[8] Shorewood's and the Corps' actions erroneously presented the Johnsons' property as pre-dam wet land when it was pre-dam dry land. *Compare* App. 113, 114, 133-52. Based on the same Clean Water Act wetland comparables seen by the commissioners, the jury arrived at the same $2,000 takings award. App. 7.

But, as a further result of the misrepresentations – the state court ensured the Johnsons received ZERO compensation remedy for the previously-adjudicated physical taking by vacating the $2,000 takings award:

> The Jury, finding that the difference between the fair market value of the entirety of the property before the City's taking and the fair market value of the remainder of the property after the City's taking was *zero*, the Respondents are not entitled to any damages for the loss of value of their property.

App. 67 – *Shorewood v. Johnson*, No. CD2344 (Minn. Dist. Ct. 1994), *aff'd* No. C5-97-1525 (Minn. App. 1998), *rev. denied* (Minn. 1998). *See* App. 7-8, 60-90.

In reality, the Corps had no federal wetland jurisdiction over the Johnsons' dry land and knew it. The Corps' Regulatory Guidance Letter 82-02, applicable to the Johnsons' situation, states:

> Thus, it is the Corps' policy that once a wetland area has been converted to another use which

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[8] From the information given at the 1996 condemnation trial and Corps' February 14, 1997 letter, the Johnsons learned that merely approximately 10% of area parcels designated on the NWI maps were ground truthed to be wetlands in fact.

> alters its wetland characteristics to where it is no longer a "water of the United States," that area will no longer come under the Corps' regulatory jurisdiction.

App. 161-62.

Prior to the 1996 condemnation jury trial, Johnson sent a January 27, 1996 letter to Corps officer Ben A. Wopat complaining that the Corps and Shorewood were acting wrongly and requested a no jurisdiction letter:

> The City claims the area is subject to City Wetland Conservation. (In making this assertion, the City relies on USCOE communications, in particular, with Bradley Nielsen and Ronald Peterson. Mr. Nielson is City Planner. Mr. Peterson is an attorney and "wild life biologist"). After three reconnaissance surveys, MFRA concluded the City imposed the restriction after the taking; the area was not a wetland before. Mr. Kepple opines legal "wetland" cannot be created by damming up an adjoining landowner's ditch without his authority. Therefore, my property did not and does not have Section 404 wetland. Please issue the disclaimer and amend your records accordingly.

App. 133-35.

In 1993, and subsequently, the Corps offered to issue a no jurisdiction letter if the Johnsons hired a Corps' suggested consultant to perform the ground truth, i.e., delineate the drainage ditch's scope and effect on land hydrology under the Corps' 1982 Regulatory Guidance Letter and the Corps' 1987 Manual. App. 123-26. The Corps stated in relevant part:

> Send a wetland delineation map, based on a delineation conducted according to the 1987 Corps of Engineers manual. A list of consultants who have indicated an interest in performing delineations is enclosed.

App. 125.

The Johnsons accepted the offer in 1995, hired the expert McCombs Frank Roos Associates ("MFRA"), on the Corps' suggested list, who delineated the scope and effect of the drainage ditch, verified by soil borings and vegetative survey, and concluded pre-dam dry land. App. 136-52. The Johnsons' consideration given was approximately $35,000 paid to the experts[9] and an agreement not to sue the Corps yet. Nonetheless, the Corps refused to acknowledge it had no jurisdiction prior to the 1996 condemnation jury trial and has made affirmative as well as passive misrepresentations along with Shorewood to the contrary in state court (1991-2000), district court (2000-2003) and the court of appeals (2002-2004).

In 1996, Ronald Johnson brought suit against the city of Minnetonka, *Johnson v. Minnetonka*, No. PD 96013128 (Minn. Dist. Ct. Mar. 14, 1996) alleging that new development of the Ashcroft subdivision in Minnetonka had been diverting storm water on to the Johnsons' property beginning as early as 1992. App. 120-22. The state court acknowledged colorable takings claims, but sua sponte dismissed the action without prejudice for failure to join necessary parties. App. 121-22.

Ronald Johnson also sued Shorewood in 1999 and later amended his complaint to add contract claims sounding in Fifth Amendment takings. *Johnson v. Shorewood*, Henn. Dist. Ct. No. 99-7447 (Minn. Dist. Ct. Jan. 31, 2000). App. 116-19. The court, citing the prior Minnetonka case, again dismissed these claims without prejudice. In the court order, the state court again acknowledged that Johnson had presented a colorable claim for "unnecessary and unwarranted" flooding. App. 118.

The Johnsons did not appeal from the state court dismissals, electing instead – on the state court's suggestion

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[9] This consideration saved the United States money by not having to perform the delineation itself.

– to file the federal district court action in May 2000 giving rise to the present federal complaint.

Today, the Corps continues to refuse to issue the no jurisdiction letter. Shorewood and the other defendants insist that their storm water sewage dump created by their dam and dumping is still a pre-ownership "Clean Water Act" wetland when it was not a wet land, but a dry land. All these events are occurring without the Johnsons having a reasonable chance at obtaining state court just compensation for the continuing and increased flooding of their property because the state courts have no personal jurisdiction over the Corps and no subject matter jurisdiction over the question of pre-ownership Clean Water Act wetland determinations.

Prior to the inverse condemnation bench trial, in response to Johnsons' Freedom of Information Act (FOIA) request, counsel for the Corps' St. Paul District, misrepresented to the Johnsons the Corps' permit actions files for the Waterford and Ashcroft projects had been previously "destroyed." App. 153-55. However, when the U.S. District Court twice denied the Johnsons federal defendant discovery on U.S. motions for protective orders and the COFC deferred Johnsons' discovery on the United States' motion to dismiss or for summary judgment, the Johnsons again resorted to FOIA discovery over the Corps' objections. App. 156-58.

In 2002, because Johnsons' Congressman assisted in the FOIA process, the Corps produced 1993 and other documents from its permit action files it asserted in 1993 it had "destroyed." *Id.* One such draft is an internal 1993 Corps' St. Paul District memorandum copied to its counsel "OC" in which the Corps stated in reference to Judge Montgomery's 1993 order, in part:

> However, what do we do if the city is forced to take out the ditch plug? Also, does the possible illegality of the plug affect our jurisdiction in any way?

App. 158. Johnsons' multiple state court actions likely would have resulted in monetary taking remedies for Johnsons if the Corps had timely produced documents from its permit action files instead of asserting those files had been "destroyed."[10]

In 2001, the U.S. District Court, based on the ZERO compensation state court final judgment, dismissed the takings claims against Shorewood, Minnetonka and the Watershed District and declined to exercise supplemental jurisdiction over other pendent state law claims. App. 21-22. Further, the U.S. District Court dismissed the claims against the United States for want of subject matter jurisdiction, referred the Johnsons' takings claim against the United States to the U.S. Court of Federal Claims and dismissed the Freedom of Information Act claim based on statute of limitations grounds. App. 18-49.

Pursuant to the U.S. District Court's July 11, 2001 order for judgment, App. 18-22, the Johnsons filed a claim in the U.S. Court of Federal Claims ("COFC"). The COFC dismissed the complaint, but suggested the Johnsons have claims actionable in U.S. District Court. App. 51-59. The Johnsons have appealed from the judgment. App. 59.

The U.S. Court of Appeals for the Eighth Circuit affirmed the U.S. District Court decision modifying some aspects of the decision – including sua sponte inclusion of the *Rooker-Feldman* doctrine to justify denial of U.S. District Court jurisdiction. App. 1-17.

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[10] It was the 2002 FOIA discovery which disclosed, among other things, that the damming and dumping was never properly permitted as misrepresented.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals Has Decided A Fundamental And Important Jurisdictional Question – That Has Not, But Should Be Decided By This Court.

The question presented above is an important jurisdictional issue that the Court has not, but should decide. The U.S. Supreme Court in *Williamson* established the jurisdictional rule that 42 U.S.C. § 1983 jurisdiction for a taking only exists after the landowner has unsuccessfully exhausted state judicial remedies for just compensation:

> [T]he taking claim is not yet ripe [in] that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 297, n. 40, 101 S.Ct., at 2371, n. 40. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation'" exist at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125, 95 S.Ct. 335, 349, 42 L.Ed.2d 320 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659, 10 S.Ct. 965, 971, 34 L.Ed. 295 (1890)). *See also Ruckelshaus v. Monsanto Co.*, 467 U.S., at 1016, 104 S.Ct., at 2879-2880; *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 21, 60 S.Ct. 413, 414, 84 L.Ed. 554 (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104, 52 S.Ct. 267, 269, 76 L.Ed. 637 (1932). If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim

> against the Government" for a taking. *Monsanto*, 467 U.S., at 1013, 1018, n. 21, 104 S.Ct., at 2878, 2881, n. 21. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. *Monsanto*, 467 U.S., at 1016-1020, 104 S.Ct., at 2880-2882. Similarly, if a State provides an adequate procedure for seeking just compensation, *the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.*

Williamson at 194-95 (emphasis added). But, this Court has never defined under what circumstances 42 U.S.C. § 1983 jurisdiction exists for landowners who claim a violation of the Just Compensation Clause because they received a state court final judgment awarding ZERO compensation for a previously-adjudicated taking. Is it true as suggested in *Williamson* that access to the U.S. District Court is available if the landowners have been "denied just compensation"? *Compare Del Monte Dunes*, 920 F.2d at 1507 ("California's compensation procedures were inadequate when the alleged taking occurred, and appellants have established the ripeness of the compensation component of their regulatory taking claim.").

The court of appeals answered "no" to these important and fundamental jurisdictional questions left unanswered by *Williamson* by sua sponte application of the *Rooker-Feldman* doctrine which requires federal courts to defer to state court judgments. App. 15; *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923).

The Johnsons argue below that the court of appeals' decision contradicts a series of U.S. Supreme Court mandates. First, this Court in *Teleprompter* held that the federal Fifth Amendment requires categorically that all physical occupation takings be compensated. This Court

concluded "that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.*, 458 U.S. at 426. This Court in *Lucas* re-stated the same principle, "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.*, 505 U.S. at 1015-16 (1992) (citations omitted) (emphasis added). The Court in *Palazzolo* again re-stated the principle, "The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal 'permanent physical occupation of real property' *requires compensation* under the Clause." *Id.*, 533 U.S. at 617 (emphasis added).

Consistent with these U.S. Supreme Court mandates, the state court in 1993 found that Johnsons had prevailed in an inverse condemnation proceeding, were entitled to Fifth Amendment just compensation and ordered the following:

> 1. The City of Shorewood shall immediately commence condemnation proceedings for the purpose of compensating the Johnsons for all damages which arise out of, and reasonably relate to, the taking by the City of the Johnsons' property.

Johnson v. City of Shorewood, No. 91-18099, at 4 (Minn. Dist. Ct., Aug. 17, 1993, Findings of Fact, Conclusions of Law and Order for Judgment) (Hennepin County District Court Judge Ann D. Montgomery) (emphasis added). App. 101.

But, inconsistent with the U.S. Supreme Court mandates, the state court in the subsequent condemnation proceeding vacated the takings award leaving Johnsons with ZERO compensation for the previously-adjudicated permanent physical taking. App. 67. The court's ZERO rationale, as explained above in the statement of the case, was based on the affirmative misrepresentations in state

court by Shorewood and the Corps of a non-existent, pre-ownership Clean Water Act wetland and the Johnsons' continual "clean up" after each and every flood event – events Judge Montgomery in 1993 concluded constituted a taking. App. 69-85, 123-32.[11] The former ZERO award also contradicted the jury's verdict which was $2,000 – much more than nothing.

Despite these facts, the court of appeals stated the following as to the application of the *Rooker-Feldman* doctrine:

> The Johnsons argue that they were denied just compensation due to "misrepresentations" perpetrated in the state court proceedings – misrepresentations which they allegedly discovered after the fact. Whatever the validity of these allegations, *Rooker-Feldman* stands as a bar to federal review because the Johnsons' requested relief "would effectively reverse the state court decision or void its ruling." *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1065 (8th Cir. 1997). *The Johnsons' remedy, if any, is to return to state court and utilize its procedures for remedying fraud. See Johnson v. Smithsonian Institution*, 189 F.3d 180, 186-187 (2nd Cir. 1999). If the state courts deny relief, the Johnsons may seek review by the United States Supreme Court.

App. 15. (Emphasis added.) The court of appeals states that Johnsons' federal Fifth Amendment right for post-deprivation just compensation for a previously-adjudicated taking is not automatic. The Johnsons must now prove fraud – not just the physical taking they already have proven. *Id.*

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[11] Since 1995, the Johnsons have continued to clean up after every "major storm event" – more frequent flooding now because of new, recent, adjoining developments – without compensation.

The court of appeals' decision does not comport with *Williamson* and the categorical requirement of compensation for physical takings expressed in *Teleprompter, Lucas* and *Palazzolo*. For all intents and purposes, the court of appeals' decision blocks the Johnsons from obtaining the constitutionally-required just compensation. The Johnsons can not pursue their Just Compensation Clause claims in state court because Minnesota's inadequacy of post-post-deprivation procedures. *Why must the Johnsons have to prove fraud to be paid federally-required just compensation for a previously-adjudicated physical taking?* The court of appeals' decision invites circuitous proceedings – circuitous proceedings never suggested by this Court in *Williamson, Teleprompter, Lucas* and *Palazzolo.*

Further, the Johnsons have not received their no-jurisdiction letter from the Corps, so the Corps' misrepresentations will be continued in state court, a court with no personal jurisdiction over the Corps or subject matter jurisdiction over Clean Water Act wetland determinations. Sending the Johnsons back to state court is *futile* – equivalent to saying the Johnsons are entitled to no federal Fifth Amendment compensation (ZERO) at all, never.

Moreover, the Johnsons do not ask the federal courts to review a state court decision as the court of appeals suggests. App. 14-15. This case involves a state court facial, per se violation of the federal right to just compensation. The U.S. District Court need not review the state court's work because ZERO is facially, per se inadequate. The U.S. District Court would simply ignore the state decision, start over and calculate just compensation because the state court awarded the Johnsons nothing for the land adjudicated as taken.

As explained in the statement of the case, the per se violation was the result of a collaborative fraud by Shorewood and the U.S. Corps of Engineers on the state court regarding fictional pre-ownership Clean Water Act wetlands based on phony National Wetland Inventory map without required ground truth. This type of fraud is

probably commonplace across the United States – and takes advantage of a federal-federal-state jurisdictional split – is important and is a problem that only this Court can resolve.[12]

For these reasons, the Court should consider the important and fundamental jurisdictional question presented above.

II. The U.S. Court Of Appeals' Decision Is In Conflict With The Decision Of The Ninth Circuit In *Del Monte Dunes v. Monterey* Which Held 1983 Jurisdiction If State Procedures For Compensating Takings Were Inadequate.

The court of appeals' decision conflicts with the U.S. Court of Appeals for the Ninth Circuit decision in *Del Monte Dunes.* In that case, the Ninth Circuit held that federal jurisdiction existed when state court post-deprivation procedures were inadequate. California state courts at the time did not recognize a compensatory remedy (only injunctions) for temporary regulatory takings. The Ninth Circuit held that *Williamson* did not prevent federal jurisdiction in that proceeding:

> After appellants filed this action, the Supreme Court expressly held that the Fifth Amendment requires states to compensate regulatory takings. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317-22, 107 S.Ct. 2378, 2387-90, 96 L.Ed.2d 250 (1987). The Court's decision in *First English* is irrelevant to the ripeness inquiry here, however, because

[12] Based on its NWI map, the Corps repeatedly tried to coerce the Johnsons into believing their land had CWA wetland. The Johnsons discovered in 1996-1997 that merely 10% of area lands so mapped had ever been ground truthed to determine whether wetlands were in fact present.

> the time at which the taking occurs is the appropriate period for measuring the adequacy of a state's compensation procedures. *Hoehne v. County of San Benito*, 870 F.2d 529, 533-34 (9th Cir. 1989); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). *See also Williamson County*, 473 U.S. at 194, 105 S.Ct. at 3121 ("all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking") (internal quotations omitted). When the City rejected appellants' last development application, California law did not permit landowners to seek compensation for a regulatory taking through an action in inverse condemnation; their sole remedy was to seek invalidation of the offending regulations through mandamus or injunctive relief. *See Agins v. City of Tiburon*, 24 Cal.3d 266, 274-78, 157 Cal.Rptr. 372, 376-78, 598 P.2d 25, 29-31 (1979), *aff'd on other grounds*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), *abrogated by*, *First English*, 482 U.S. 304, 107 S.Ct. 2378 (1987). As a result, California's compensation procedures were inadequate when the alleged taking occurred, and appellants have established the ripeness of the compensation component of their regulatory taking claim. Because both the taking and compensation elements are ripe, we reverse the district court's dismissal of that claim.

Del Monte Dunes, 920 F.2d at 1507.

The Johnson case is similar. California at the time of the Del Monte Dunes case did not provide the landowners a compensatory remedy as a matter of law. The Minnesota courts and defendants have not provided the Johnsons a compensatory remedy as a matter of fact. As the court of appeals' decision states, "[t]he state court vacated the $2,000 takings award" – leaving the Johnsons with ZERO

for the previously-adjudicated physical taking. The decision in *Del Monte Dunes* supports U.S. District Court jurisdiction in the Johnson case.

The court of appeals' decision directly conflicts with *Del Monte Dunes*. The court of appeals gives no weight to the fact Johnsons received ZERO compensation from the state court and have only post-post-deprivation fraud procedures in state court to get paid. *See* Minn. R. Civ. Proc. 60.02. The court of appeals states that federal courts (except the U.S. Supreme Court in appeals from state supreme courts) have no role whatsoever after a state court awards ZERO compensation for a previously-adjudicated physical taking.

The Johnsons agree with the court in *Del Monte Dunes* that 42 U.S.C. § 1983 provides jurisdiction for a federal Fifth Amendment just compensation claim when a state court provides ZERO compensation for a taking – as a matter of law or as a matter of fact. The court of appeals disagrees. This Court should resolve the conflict among the circuit courts of the U.S. Court of Appeals.

III. The Court Of Appeals' Decision Is In Conflict With The Decisions Of The Other Circuits Which Have Held 1983 Jurisdiction Despite *Rooker-Feldman* Doctrine If Federal Plaintiff Did Not Have Reasonable Opportunity To Bring Claim In State Court Proceeding.

The court of appeals' decision based on the *Rooker-Feldman* doctrine conflicts with the limitation on *Rooker-Feldman* doctrine that the doctrine only applies when the federal plaintiff had a reasonable opportunity to present his or her claims in state court. This limitation on the applicability of *Rooker-Feldman* was first set forth in *Wood v. Orange County*, 715 F.2d 1543 (11th Cir. 1983):

> The [*Rooker-Feldman* doctrine] can apply only where the plaintiff had a reasonable opportunity to raise his federal claim in state proceedings.

> Where the plaintiff has had no such opportunity, he cannot fairly be said to have "failed" to raise the issue. Moreover, an issue that a plaintiff had no reasonable opportunity to raise cannot properly be regarded as part of the state case. In *Feldman's* language, the issue that such a plaintiff asks the federal court to decide is not "inextricably intertwined" with the state court's judgment. As a result, the federal district court's jurisdiction does not trench on the exclusive authority of the Supreme Court to review state court decisions for errors of federal law. . . . Finally, interpreting *Rooker* to preclude a federal district court from considering an issue that the plaintiff had no reasonable opportunity to raise in state court might pose due process problems. Such a harsh rule might deprive the plaintiff from any forum, state or federal, where he has a reasonable opportunity to present his federal constitutional claims, a result arguably contrary to the requirements of due process.

Id. at 1547. The court of appeals in *Wood* held that the *Rooker-Feldman* doctrine and res judicata did not preclude plaintiffs' suit in federal district court challenging the validity of the liens where plaintiffs lacked a reasonable opportunity to litigate the claims in the state court proceedings. *Id.*

In *Long*, the Seventh Circuit applied the "reasonable opportunity to litigate" limitation and found federal jurisdiction despite *Rooker-Feldman* doctrine when the plaintiff did not have a reasonable opportunity to litigate his Section 1983 claims in the related state court proceeding. The Seventh Circuit recognized that the federal plaintiff could not reasonably have been expected to litigate plaintiff's federal claims in the state court proceeding:

> . . . there has been absolutely no showing that a defendant has ever asserted the rights provided for in the FDCPA [Fair Debt Collections Practices

> Act] as an affirmative defense or brought a counterclaim under this statute in a forcible entry and detainer action in Illinois. It is likely that Long's claims for damage under the FDCPA and Section 1983 would not have been germane to the forcible entry and detainer action brought by defendants.

Long, 182 F.3d at 559-60. *See also Biddulph v. Mortham*, 89 F.3d 1491, 1495 n. 1 (11th Cir. 1996) (concluding that state court denial of mandamus relief on the same claims raised by plaintiff precluded applicability of *Rooker-Feldman* doctrine because plaintiff did not have a reasonable opportunity to raise his federal claim in the mandamus proceeding); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472-73 (9th Cir. 1985) (concluding that *Rooker-Feldman* was inapplicable to plaintiff's federal claims because the Hawaii Supreme Court refused to consider these claims during the plaintiff's state court proceedings), *vacated on other grounds*, 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed.2d 560 (1986).

Johnsons' case is similar to the facts in *Wood*, *Long* and these other cases. The Johnsons could not have reasonably litigated the federal question of pre-ownership Clean Water Act wetland determination in the 1996 state court proceeding. First, the state court did not have personal jurisdiction over the Corps and federal courts are the court of review for Corps' Clean Water Act wetland determinations – not state courts. Second, Judge Montgomery in her 1993 order expressly reserved the wetland designation as disputed and for later determination. App. 97, findings of fact no. 3. Third, in the subsequent condemnation proceeding, the state court judge erroneously excluded evidence contrary to a pre-ownership Clean Water Act wetland under the doctrine of collateral estoppel. App. 90. Fourth, under these circumstances, the trial testimony of Shorewood expert Ronald Peterson interpreting the Corps' letters determining a pre-ownership Clean Water Act wetland on the Johnsons' property was unassailable. Fifth, the Respondents misled the Johnsons as to

the accuracy and efficacy of the National Wetland Inventory maps. Sixth, the Johnsons had no right to appeal in state court from the Corps' pre-ownership wetland determination presented in state court. For these reasons, the Johnsons never had a reasonable opportunity to litigate their Just Compensation Clause claims in state court. The court of appeals' decision conflicts with the "reasonable opportunity to litigate" limitation recognized by these other circuits. The court of appeals' opinion offers no analysis as to whether the Johnsons had a reasonable opportunity to litigate their claims in state court. Any analysis of the Johnsons' problems in state court would have led to a conclusion the Johnsons had no reasonable opportunity to litigate the issue of pre-ownership Clean Water Act wetlands in state court. But, the court of appeals did not analyze the issue like the other circuits do.

The Johnsons agree with the federal courts that have held that the *Rooker-Feldman* doctrine does not prevent jurisdiction when the federal plaintiffs do not have a reasonable opportunity to litigate the claims in the related state court proceeding. The court of appeals disagrees. *See also Gisslen v. City of Crystal*, 345 F.3d 624 (8th Cir. 2003), *pet. for writ of cert. denied* (No. 03-1141 2004); *Lemonds v. St. Louis County*, 222 F.3d 488 (8th Cir. 2000). The Johnsons believe this Court should resolve this conflict among the circuit courts of the U.S. Court of Appeals.

IV. Federal Jurisdiction In This Case Would Be Only A Narrow Exception To The *Rooker-Feldman* Doctrine And Provides A Useful Guidepost For Both Federal And State Courts In Future State Court Proceedings.

The Johnsons are asking the U.S. Supreme Court for only a narrow exception to the *Rooker-Feldman* doctrine as it applies to state court condemnation proceedings. The exception can be stated in one sentence and is consistent with the Court's *Williamson* opinion:

> If a state court awards ZERO compensation as a federal Fifth Amendment just compensation remedy for a previously-adjudicated physical taking of land, then 42 U.S.C. § 1983 jurisdiction exists for a violation of the Just Compensation Clause.

Accord, *Williamson*, 473 U.S. at 194-95. No Pandora's Box of redundant federal re-litigation of taking claims is opened because the exception is limited to when a state court commits an obvious, defined facial per se constitutional tort.

The U.S. Supreme Court decision would be a useful guidepost to state courts and federal courts in future proceedings. The decision would indicate to the state courts that federal Fifth Amendment just compensation requires more than ZERO to be paid to the landowner for the property adjudicated as physically taken – and worth more than ZERO as the jury determined herein. The decision would also indicate to the federal courts when state courts award ZERO federal Fifth Amendment compensation for a previously-adjudicated physical taking, 42 U.S.C. § 1983 jurisdiction exists. This result is not only mandated by the U.S. Constitution's Just Compensation Clause and the text of 42 U.S.C. § 1983, but also by common sense.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-3562

Ronald Richard Johnson;
Dee Lundberg Johnson,

Plaintiffs/Appellants,

v.

City of Shorewood, Minnesota; City of Minnetonka, Minnesota, and its Mayor in her official capacity; Riley-Purgatory-Bluff Creek Watershed District, and the Chair of its Board of Managers in his official capacity; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner & Koppelman, Inc., a corporation; Highland Villa Builders Inc., a corporation; United States of America; Corps of Engineers, being sued as the Corps of Engineers of the United States; Louis Caldera, The Honorable, Secretary of the United States Army in his/her official capacity or his successor; Joseph N. Ballard, Lt. General, the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity,

Defendants/Appellees.

Appeals from the United States District Court for the District of Minnesota.

No. 02-4081

Ronald Richard Johnson;
Dee Lundberg Johnson,

Plaintiffs/Appellees,

v.

City of Shorewood, Minnesota;

Defendant/Appellant,

City of Minnetonka, Minnesota, and its Mayor in her official capacity; Riley-Purgatory-Bluff Creek Watershed District, and the Chair of its Board of Managers in his official capacity; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Steiner & Koppelman, Inc., a corporation; United States of America; Corps of Engineers, being sued as the Corps of Engineers of the United States; Louis Caldera, The Honorable, Secretary of the United States Army in his/her official capacity or his successor; Joseph N. Ballard, Lt. General, the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity; Highland Properties, Inc., a corporation; Highland Villa Builders, Inc., a corporation,

Defendants/Appellees.

No. 03-2023

Ronald Richard Johnson; Dee Lundberg Johnson, Plaintiffs/Appellants, v. City of Shorewood, Minnesota; and its Mayor in her official capacity; City of Minnetonka, Minnesota, and its Mayor in her official capacity; Riley-Purgatory-Bluff Creek Watershed District, and the Chair of its Board of Managers in his official capacity; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner & Koppelman, Inc., a corporation; Highland Villa Builders Inc., a corporation; United States of America; Corps of Engineers, being sued as the Corps of Engineers of the United States; The Honorable Louis Caldera, Secretary of the United States Army in his/her official capacity or his successor; Lt. General Joseph N. Ballard, the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity, Defendants/Appellees.	Appeals from the United States District Court for the District of Minnesota.

Submitted: December 18, 2003
Filed: March 5, 2004

Before LOKEN, Chief Judge, WOLLMAN, and HANSEN, Circuit Judges.

WOLLMAN, Circuit Judge.

This appeal represents the continuation of Ronald and Dee Johnson's multi-year litigation over a 20-acre parcel of land they own in Hennepin County, Minnesota. After pursuing several state court actions during the 1990s, the Johnsons brought this suit in federal court against the cities of Shorewood and Minnetonka, Minnesota, the Riley-Purgatory-Bluff Creek Watershed District (Watershed District), various private real estate developers,[1] and the United States of America (acting through the Army Corps of Engineers and certain Army officials). The Johnsons assert a multitude of federal and state claims, but their primary allegation is that the appellees have, individually and in concert, effected various regulatory and physical takings of their property and conspired to prevent them from receiving just compensation. Adopting a series of reports and recommendations by a magistrate judge,[2]

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[1] Trivesco (a partnership); Robert H. Mason Homes, Inc.; Highland Properties, Inc.; and Steiner & Koppelman, Inc.

[2] The Honorable Susan Richard Nelson, United States Magistrate Judge for the District of Minnesota.

the district court[3] dismissed the claims against the United States for want of subject matter jurisdiction and on statute of limitations grounds, granted summary judgment to the remaining defendants, and declined to exercise supplemental jurisdiction over the pendent state law claims.[4] The Johnsons appeal each of these decisions, as well as certain discovery rulings and the decision denying them leave to submit a third amended complaint. Shorewood cross-appeals, arguing that the district court should have found certain claims barred by res judicata. We affirm in all respects, albeit on slightly different grounds with respect to some of the claims.

I.

The subject property, which the Johnsons purchased in 1981, is located within the city of Shorewood. It consists of three wooded knolls separated by a flat, centrally located field. The field is diagonally bisected by a drainage ditch running from the northeast corner to the southwest corner. Before 1984, water ran through the ditch and headed south from the Johnson property, ultimately emptying into Purgatory Creek. In 1980, prior to the Johnsons' purchase, the field was designated as a wetland

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[3] The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota.

[4] After summary judgment had been entered, the district court allowed Johnson to submit two affidavits that had not been made part of the summary judgment record. After reviewing the affidavits, the district court concluded that it was not necessary to vacate the prior orders.

on the National Wetland Inventory Map issued by the United States Fish and Wildlife Service.[5]

After the Johnsons purchased the property, Trivesco began developing land to the south and west. Dubbed "Waterford," the resulting subdivision required the installation of roads and utilities. In 1984, Shorewood obtained the consent of the United States Army Corps of Engineers to install the roads and utilities under an existing Clean Water Act Permit that authorized the filling of "headwaters wetlands." The Watershed District issued permits for the work.

Shorewood constructed a road berm, culvert, and pond-control structure along the southern boundary of the Johnson property. The pond-control structure raised the bottom of the drainage ditch above its original elevation and created a pond near the southern boundary of the Johnson property. Based on the design of the pond-control structure, the Watershed District designated a 100-year storm event flood plain at an elevation of 917.1 feet above sea level and prohibited construction at elevations lower than 919.1 feet. *Johnson v. City of Shorewood,* No. 91-18099, at 4 (Minn. Dist. Ct., Aug. 17, 1993, Findings of Fact, Conclusions of Law, and Order For Judgment).

The Johnsons commenced state court litigation against Shorewood in 1991, alleging inverse condemnation under both the federal and Minnesota constitutions. The state court determined that the flood plain restrictions did not constitute a regulatory taking, but concluded that the

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[5] The Johnsons contest the validity of this designation.

pond and associated control structure had physically taken the Johnsons' property up to 914 feet above sea level because the pond would rise to that elevation during "major storm events." *Id.* at 5. Accordingly, the state court issued a writ of mandamus compelling Shorewood to commence condemnation proceedings for the purpose of acquiring a drainage easement on the Johnsons' property up to 914 feet above sea level. *Id.* The Minnesota Court of Appeals affirmed this judgment. *Johnson v. City of Shorewood,* No. CX-93-2452 (Minn. Ct. App. May 11, 1994), *review denied,* (Minn. July 15, 1994).

Shorewood instituted condemnation proceedings and awarded the Johnsons $2,000 for the easement and $3,000 for "cost to cure" damages. Not satisfied with the award, the Johnsons brought a second state court action, this one challenging the scope of the taking and the amount of the award. The state court held that the Johnsons were collaterally estopped from re-litigating the scope of the taking[6] and submitted the valuation issue to a jury. The jury awarded the Johnsons $2,000 for the taking and $63,000 for clean-up costs. The state court vacated the $2,000 takings award, however, in light of the jury's

[6] In the first action, the Johnsons challenged certain conditions that Shorewood had placed on the plat approval of Johnson property, and although the record does not precisely disclose what was argued at the first trial, the second state court found as follows: "[B]ecause the issue concerning the pre-ownership wetland designation relating to the Property, and the issue concerning the City's conditions for plat approval, were already adjudicated [in the first state proceeding] . . . upon a motion for summary judgment, the doctrine of collateral estoppel clearly precludes the introduction of evidence or argument [to the] . . . contrary." *City of Shorewood v. Johnson,* No. CD-2344, at 5 (Minn. Dist. Ct., Oct. 10, 1996, Memorandum and Order).

finding that the taking had not diminished the market value of the Johnsons' land. Although both parties appealed, the Johnsons did not contest the amount of the award. The Minnesota Court of Appeals affirmed the judgment, holding that the $63,000 award was appropriate because the value of the Johnsons' property would have been diminished absent clean-up of debris caused by the flooding. *City of Shorewood v. Johnson,* No. C5-97-1525, 1998 WL 188561, at * 1 (Minn. Ct. App. April 21, 1998).

In 1996, the Johnsons brought suit against the city of Minnetonka, alleging that development of the Aschcroft subdivision in Minnetonka had been diverting storm water on to the Johnsons's property since as early as 1992. The state court dismissed the action without prejudice for failure to join necessary parties. The Johnsons did not appeal from the dismissal, electing instead to file the federal district court action giving rise to the present appeal.

The Johnsons's second amended complaint spans fifty-five pages and includes twenty-three counts. It alleges numerous constitutional violations stemming from regulatory and physical takings of the Johnson property from at least 1984 to the present,[7] and alleges a conspiracy to accomplish the takings and to prevent the Johnsons from receiving compensation. The complaint also alleges a

[7] For example, shortly after the Johnsons filed their initial complaint, Shorewood allegedly extended a public fence and walking trail onto the eastern boundary of the Johnsons's property and buried fiber optic cables parallel with the adjacent road. The Johnsons' second amended complaint identifies this action as an uncompensated taking.

violation by the United States of the Freedom of Information Act (FOIA) and includes a battery of pendent state law claims for, *inter alia,* breach of contract, promissory estoppel, fraud, misrepresentation, negligence, and inverse condemnation.

II.

A. Claims Against The United States

The district court concluded that it lacked subject matter jurisdiction over the Johnsons's takings claims against the United States. Having reviewed the dismissal de novo, *Lemonds v. St. Louis County,* 222 F.3d 488, 492 (8th Cir. 2000), we agree. The United States Court of Federal Claims has exclusive subject matter jurisdiction over takings claims against the United States that exceed $10,000 in amount. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1); *Eastern Enterprises v. Apfel,* 524 U.S. 498, 520 (1998); *Mullally v. United States,* 95 F.3d 12, 14 (8th Cir. 1996). The Johnsons clearly sought damages in excess of $10,000, and they have in fact filed takings claims against the United States in the Court of Federal Claims.

Nevertheless, the Johnsons suggest that dismissal of their takings claims violates their right to a jury trial under the Seventh Amendment. This argument fails, however, because parties are not entitled to a jury trial in most actions against the United States, *see* 28 U.S.C. § 2402, a limitation that derives from the sovereign power of the United States to limit when and how it may be sued. *See United States v. Sherwood,* 312 U.S. 584, 587 (1941); *United States v. Kearns,* 177 F.3d 706, 709 (8th Cir. 1999).

The district court also granted summary judgment on the Johnsons' FOIA claim on the ground that it was barred

by the applicable statute of limitations. The Johnsons assert on appeal that the United States is estopped from asserting the statute of limitations defense because it "fraudulently" stated that it had destroyed certain documents when in fact it had not. This contention was not raised in the district court, however, and so we will not consider it on appeal. *Orion Financial Corp. v. American Foods Group, Inc.,* 281 F.3d 733, 740 (8th Cir. 2002).

In any event, the claim would be moot because we could not grant the relief the Johnsons seek. *Cf. Doe v. Pulaski County Special School Dist.,* 306 F.3d 616, 621 (8th Cir. 2002) (en banc) ("[A]n appeal must be dismissed as moot when our decision will have no 'effectual relief whatever to a prevailing party.'" (citation omitted)). The Johnsons do not argue that the United States should release any particular information or documents under FOIA, but instead suggest that the FOIA violation would have led to discovery of evidence that would have allowed them to recover just compensation in the state court proceedings. They claim that they can therefore assert "tort claims" against the United States. FOIA, however, is a comprehensive scheme that provides for injunctive relief only, not tort liability or damages, *see* 5 U.S.C. § 552(a)(4)(B) (delineating the powers of the district court on proof of a FOIA violation), and thus the Johnsons could not recover tort damages based on a FOIA violation. *See Johnson v. Executive Office for U.S. Attorneys,* 310 F.3d 771, 777 (D.C. Cir. 2002).

In a related vein, counsel for the Johnsons suggested at oral argument that the Johnsons still possess viable claims against the United States under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.,* and for a "per se constitutional tort" because unidentified federal agents

"misrepresented" that the Johnsons' property was a federal wetland in the state litigation and thereby diminished the jury's valuation judgment. Putting aside the question of the validity of these theories of recovery, they do not appear in the governing pleadings and were never properly raised before the district court, and so we will not consider them. The second amended complaint is devoid of references to the APA, does not request review of any final agency action, fails to mention *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), and does not specify constitutional violations by federal officials that are distinct from the takings claims over which the district court lacked jurisdiction.[8]

B. Claims Against The Remaining Defendants

In adopting the magistrate judge's recommendations, the district court found that the Johnsons had not produced evidence of a conspiracy sufficient to survive summary judgment on their claim under 42 U.S.C. § 1985. The court also granted summary judgment on the Johnsons' claims under 42 U.S.C. § 1983, adopting the magistrate judge's reasoning that those claims "were either fully litigated in the earlier state court proceedings or are not ripe because they have not been presented to the state

[8] The Johnsons have repeatedly raised new issues throughout the course of this litigation. They never pleaded the alleged violations of environmental laws that appear in the statement of issues in the opening paragraphs of their brief, nor the allegations of First Amendment violations. The same is true of the alleged trespasses and property damage committed by the federal defendants during the summer of 2002, and the additional FOIA violations mentioned in the Johnsons' reply brief.

court." Magistrate Judge's Recommendation of May 3, 2001, at 5. Having reviewed the grant of summary judgment de novo, applying the same standard as that applied by the district court, *Evergreen Investments, LLC v. FCL Graphics, Inc.,* 334 F.3d 750, 753 (8th Cir. 2003), we conclude that the district court did not err in granting summary judgment.

A successful claim under 42 U.S.C. § 1985 requires evidence of a conspiracy to deprive a plaintiff of civil rights. *See Jensen v. Henderson,* 315 F.3d 854, 862 (8th Cir. 2002). On summary judgment, then, it was the Johnsons' burden to advance some "facts which would suggest that appellees reached an understanding to violate [the Johnsons'] rights." *Id. (citing Larson v. Miller,* 76 F.3d 1446, 1454 (8th Cir. 1996)). From our review of the voluminous record,[9] including an affidavit by the former mayor of Shorewood, we agree that the Johnsons failed in this endeavor. The record and the Johnsons' appellate briefs are replete with speculation regarding a conspiracy, *see e.g., Marquez v. Bridgestone/Firestone, Inc.,* 353 F.3d 1037, 1038 (8th Cir. 2004) (per curiam), but nowhere do the Johnsons point to specific facts tending to show an illicit agreement among the defendants. It is not a court's obligation to search the record for specific facts that might support a litigant's claim, *see Crossley v. Georgia-Pacific Corp.,* No. 03-2320, 2004 WL 99022, at *1 (8th Cir. Jan.22, 2004) (per curiam), and we are not disposed to undertake such a task in this case.

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[9] We have considered the affidavits that were originally omitted from the summary judgment record.

At most, the Johnsons' evidence suggests that the United States, the Watershed District, the municipal defendants, and the private developers worked together on various development projects and communicated with each other, but this alone is insufficient to generate a genuine issue of material fact regarding the existence of a conspiracy. This lack of evidence also dooms for want of state action the Johnsons' federal claims against the private developers under 42 U.S.C. § 1983. *See Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 536 (8th Cir. 1999). As for the 42 U.S.C. § 1983 claims against Shorewood, Minnetonka, and the Watershed District, we agree that "the record does not show the existence of any potential constitutional violation . . . other than the alleged taking of the Johnsons' property without just compensation." Magistrate Judge's Recommendation of May 3, 2001, at 5 n 2.

The United States Supreme Court has ruled that takings claims are not ripe for adjudication in federal court unless and until they have been exhausted in state administrative and judicial proceedings. *See Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (*Williamson County*) (concluding that a property owner "has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation."). Moreover, federal courts give full faith and credit to state court judgments, *see* 28 U.S.C. § 1738; *Mitra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 81 (1984), and a state judgment on the merits is binding absent a grant of certiorari from the United States Supreme Court or the existence of a statute providing for

federal review of the state decision. *See, e.g.,* 28 U.S.C. § 2254.

Finally, because the United States Supreme Court alone has jurisdiction to review state court decisions, the lower federal courts lack subject matter jurisdiction to consider federal claims that would vitiate an underlying state court judgment. *Lemonds,* 222 F.3d at 492; *see also District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 483 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 416 (1923). With the limited exception of habeas corpus actions, this principle, known as the *Rooker-Feldman* doctrine, applies whenever a federal claim would succeed only "to the extent that the state court wrongly decided the issues before it." *Simes v. Huckabee,* 354 F.3d 823, 827 (8th Cir. 2004) (*quoting Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 25 (1987) (Marshall, J., concurring)). Unlike collateral estoppel, the *Rooker-Feldman* doctrine does not necessarily depend upon an identity of parties or claims between the state and federal litigation, and because the doctrine is jurisdictional, it may be raised sua sponte. *Lemonds,* 222 F.3d at 492-93.

Many of the Johnsons' claims call upon us to consider issues identical to those on which the Johnsons have already obtained a state court decision, especially as against Shorewood. Although the district court mentioned our decision in *Lemonds,* it disposed of claims actually litigated in the state court cases under principles of collateral estoppel. We believe the problem is more fundamental. To the extent the Johnsons' alleged constitutional injury stems from claims adjudicated in the prior state court judgment, the district court lacked jurisdiction under *Rooker-Feldman* because the Johnsons are essentially challenging the state judgment as inadequate and are

"asking the federal court for the same remedy requested in the state court action: just compensation." *Gisslen v. City of Crystal,* 345 F.3d 624, 628 (8th Cir. 2003), *petition for cert. filed,* No. 03-1141 (Feb. 4, 2004). Moreover, the claims may be unripe under *Williamson County* because the Johnsons failed to appeal the sufficiency of the state court jury award.

The Johnsons argue that they were denied just compensation due to "misrepresentations" perpetrated in the state court proceedings – misrepresentations which they allegedly discovered after the fact. Whatever the validity of these allegations, *Rooker-Feldman* stands as a bar to federal review because the Johnsons' requested relief "would effectively reverse the state court decision or void its ruling." *Bechtold v. City of Rosemount,* 104 F.3d 1062, 1065 (8th Cir. 1997). The Johnsons' remedy, if any, is to return to state court and utilize its procedures for remedying fraud. *See Johnson v. Smithsonian Institution,* 189 F.3d 180, 186-87 (2d Cir. 1999). If the state courts deny relief, the Johnsons may seek review by the United States Supreme Court.

The Johnsons' claims that were not adjudicated in state proceedings suffer a similar fate, although for a different reason. Although claims not presented or adjudicated in state proceedings may not be not barred by *Rooker-Feldman, Williamson County* still applies. Thus, all of the claims which the Johnsons failed to present in the state litigation, as well as all of the claims which arose after the state court fixed the takings issues to be decided, are unripe for adjudication in federal court because the Johnsons have failed to pursue state postdeprivation remedies for those alleged takings. *See Kottschade v. City*

of Rochester, 319 F.3d 1038, 1042 (8th Cir.), *cert. denied,* 124 S. Ct. 178 (2003).

C. Dismissal of State Law Claims

Because the court granted dismissal or summary judgment on all of the Johnsons' federal claims, it declined to exercise jurisdiction over the Johnsons' supplemental state law claims, dismissing them without prejudice. A federal district court has the discretionary power to decline jurisdiction where it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The Supreme Court has noted that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n. 7 (1988). That is precisely the case here, and we find no abuse of discretion in the district court's decision to dismiss the pendent claims. *See Innovative Home Health Care, Inc. v. P.T.-O.T. Assoc.,* 141 F.3d 1284, 1287 (8th Cir. 1998); *McLaurin v. Prater,* 30 F.3d 982, 985 (8th Cir. 1994).[10]

D. Shorewood's Cross-Appeal

Shorewood's cross-appeal contends that many of the Johnsons' current claims could have been brought during

[10] We have considered and find to be without merit the Johnsons' contentions regarding the rulings on discovery procedures and the denial of their motion to file a third amended complaint.

the state court proceedings described above. Shorewood suggests that not only does collateral estoppel bar consideration of claims actually litigated, res judicata bars claims that could have been litigated during the state court proceedings. Perhaps so, but in light of our holding that *Rooker-Feldman* deprived the district court of subject matter jurisdiction, we need not address this argument. Because *Rooker-Feldman* and *Williamson County* preclude federal review of the Johnsons' various takings claims, the determination regarding the precise reach of the state court judgment is a matter for the state courts to decide.

Conclusion

As modified to reflect our holding that the district court was without jurisdiction to consider certain of the Johnsons' claims, the judgment is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

RONALD RICHARD JOHNSON and DEE LUNDBERG JOHNSON,

Plaintiffs,

v.

CITY OF SHOREWOOD, and its Mayor in his official capacity; CITY OF MINNETONKA, and its Mayor in her official capacity; RILEY-PURGATORY-BLUFF CREEK WATERSHED DISTRICT, and the Chair of its Board of Managers in his official capacity; TRIVESCO, a partnership, and its partners; ROBERT H. MASON, INC., a corporation; HIGHLAND PROPERTIES, INC., a corporation; STEINER & KOPPELMAN, INC., a corporation; HIGHLAND VILLA BUILDERS INC., a corporation; UNITED STATES OF AMERICA; CORPS OF ENGINEERS, being sued as the Corps of Engineers of the United States; THE HONORABLE LOUIS CALDERA, Secretary of the United States Army in his/her official capacity or his successor; and LT. GENERAL JOSEPH N. BALLARD, the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity,

Defendants.

Civil No. 00-1281 (DWF/SRN)

ORDER

(Filed Jul. 11, 2001)

This matter is before the Court upon Plaintiffs' objections to two Reports and Recommendations of Magistrate Judge Susan Richard Nelson. The first Report and Recommendation, dated May 3, 2001, recommends that the Federal Defendants' Motion to Dismiss or for Summary Judgment (Doc. No. 20) be granted; that all claims against the Federal Defendants, with the exception of claims under the Freedom of Information Act, be dismissed without prejudice for lack of jurisdiction, which lies exclusively in the United States Court of Federal Claims; that the Freedom of Information Act claim be dismissed with prejudice based upon the applicable statute of limitations; that the City of Shorewood's Motion for Summary Judgment (Doc. No. 57) and the City of Minnetonka's Motion for Summary Judgment (Doc. No. 46) be granted in part; that all claims arising from the prior state court litigation be barred by collateral estoppel and be dismissed with prejudice; that all remaining claims against the City of Shorewood and the City of Minnetonka either are unripe or are supplemental state law claims over which the Court should decline to exercise jurisdiction, and that, therefore, such claims be dismissed without prejudice; and finally, that the Plaintiffs' Motions to Amend (Doc. Nos. 25 and 75) and Motion to Continue Deadlines (Doc. No. 67) be denied. The Defendants support the recommendations of the Report and Recommendation of May 3, 2001. The Plaintiffs object in all respects to the Report and Recommendation of May 3, 2001.

Magistrate Judge Nelson's Report and Recommendation dated May 18, 2001, recommends that Defendant Riley-Purgatory-Bluff Creek Watershed District's ("the District") Motion for Summary Judgment (Doc. No. 97)

and Defendants Trivesco, Robert H. Mason, Inc., Highland Properties, Inc., and Steiner & Koppelman, Inc.'s (collectively "Trivesco") Motion for Summary Judgment (Doc. No. 122) be granted in part; that all claims arising from the prior state court litigation be barred by collateral estoppel and be dismissed with prejudice; that all remaining claims against the District and Trivesco either are unripe or are supplemental state law claims over which the Court should decline to exercise jurisdiction and, therefore, such claims be dismissed without prejudice. The Defendants support the Report and Recommendation of May 18, 2001. The Plaintiffs object in all respects to the Report and Recommendation of May 18, 2001.

There are two standards for a district court's review of the order of a magistrate judge. A nondispositive order may only be reversed if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(a); Fed. R. Civ. P. 72(a). This is an "extremely deferential standard." *Reko v. Creative Promotions, Inc.*, 70 F. Supp. 2d 1005, 1007 (D. Minn. 1999). Conversely, if the order concerns a dispositive motion, the district court must review the magistrate judge's decision *de novo* and "may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(a). A motion is dispositive if it removes a claim or defense from the litigation. *Id.; Vega v. Univ. of N.Y.*, 67 F. Supp. 2d 324, 334 (S.D.N.Y. 1999).

With respect to all of the recommendations of Magistrate Judge Nelson, except for the recommendation that the Plaintiffs' Motions to Amend and Motion to Continue Deadlines be denied, the Court has conducted a *de novo* review of the record. 28 U.S.C. § 636(b)(1);

Local Rule 72.1(c). With respect to Magistrate Judge Nelson's recommendation in the Report and Recommendation of May 3, 2001, to deny Plaintiffs' Motions to Amend and to deny Plaintiffs' Motion to Continue Deadlines, the Court must modify or set aside any portion of the Magistrate's order, nondispositive in nature, found to be clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); Local Rule 72.1(b)(2).

Based upon the Court's review of the record, the Court having reviewed the arguments and submissions of the parties, and the Court being otherwise duly advised in the premises, the Court hereby adopts the Reports and Recommendations of Magistrate Judge Nelson of May 3, 2001, and May 18, 2001.

Accordingly, **IT IS HEREBY ORDERED**:

MAY 3, 2001, REPORT AND RECOMMENDATION

1. The Federal Defendants' Motion to Dismiss or for Summary Judgment (Doc. No. 20) is **GRANTED**. All claims against the Federal Defendants with the exception of claims under the Freedom of Information Act are **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction, which lies exclusively in the United States Court of Federal Claims. Further, the Freedom of Information Act claim is **DISMISSED WITH PREJUDICE** based on the applicable statue of limitations.

2. The City of Shorewood's Motion for Summary Judgment (Doc. No. 57) and the City of Minnetonka's Motion for Summary Judgment (Doc. No. 46) are **GRANTED** in part. All claims arising from the prior state court litigation are barred by collateral estoppel and are **DISMISSED**

WITH PREJUDICE. All remaining claims against the City of Shorewood and the City of Minnetonka either are unripe or are supplemental state law claims over which the Court declines to exercise jurisdiction and, therefore, such claims are **DISMISSED WITHOUT PREJUDICE**.

3. Magistrate Judge Susan Richard Nelson's order of May 3, 2001, denying Plaintiffs' Motions to Amend (Doc. Nos. 25 and 27) and denying Plaintiffs' Motion to Continue Deadlines (Doc. No. 67) is **AFFIRMED**. Plaintiffs' objections and appeal of that portion of the May 3, 2001, Report and Recommendation is **DISMISSED**. Alternatively, Plaintiffs' Motions to Amend and Motion to Continue Deadlines are **DENIED**.

MAY 18, 2001, REPORT AND RECOMMENDATION

4. The District's Motion for Summary Judgment (Doc. No. 97) and Trivesco's Motion for Summary Judgment (Doc. No. 122) are **GRANTED** in part. All claims arising from the prior state court litigation are barred by collateral estoppel and are **DISMISSED WITH PREJUDICE**. All remaining claims against the District and Trivesco either are unripe or are supplemental state law claims over which the Court declines to exercise jurisdiction, and such claims are therefore **DISMISSED WITHOUT PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 11, 2001

/s/ Donovan W. Frank
DONOVAN W. FRANK
Judge of United States
District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Ronald Richard Johnson and Dee Lundberg Johnson,

Plaintiffs,

v.

City of Shorewood, and its Mayor in his official capacity; City of Minnetonka, and its Mayor in her official capacity; Riley-Purgatory-Bluff Creek Watershed District, and the Chair of its Board of Managers in his official capacity; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Steiner & Koppelman, Inc., a corporation; United States of America; Corps of Engineers, being sued as the Corps of Engineers of the United States; The Honorable Louis Caldera, Secretary of the United States Army in his/her official capacity or his successor; and Lt. General Joseph N. Ballard, the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity,

Defendants.

Civil No. 00-1281 (DWF/SRN)

ORDER

(Filed Mar. 13, 2003)

This matter is before the Court upon Plaintiffs' request for leave of the Court, pursuant to Local Rule 7.1(g) to file a motion for reconsideration of the Court's order of October 7, 2002, in which the Court denied Plaintiffs' motion to vacate the order of July 11, 2001, and the order of October 7, 2002, in which the Court denied Plaintiffs' motion to vacate the order of July 11, 2001, and the order of October 10, 2001. The order of February 10, 2003, simply directed the Clerk of Court to enter judgment in the above-entitled matter to clarify the procedural status of the case, namely, that no further matters were pending before the Court. In fact, judgment had already been entered on the July 11, 2001, order.

Based upon the record before the Court, including the submissions of the Plaintiffs; the Court having duly evaluated and reviewed the submissions of the Plaintiffs, including the procedural history of the file; and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

ORDER

1. Plaintiff's request to file a motion for reconsideration (Doc. No. 202) is respectfully **DENIED.**

Dated: March 13, 2003 /s/ Donovan W. Frank
DONOVAN W. FRANK
Judge of United States
District Court

MEMORANDUM

The Court entered an order on July 11, 2001, and entered judgment accordingly. The Court entered subsequent orders on October 10, 2001, and October 7, 2002. In the order of October 7, 2002, the Court allowed the

Plaintiff's to supplement the record with two additional affidavits. The Court then considered the new documents in the context of the earlier motions for summary judgment addressed in the Court's order of July 11, 2001, and October 10, 2001, and then declined to vacate the order of July 11, 2001, and the order of October 10, 2001. The order of February 10, 2003, simply clarified the procedural status of the case by documenting that no further matters were pending before the Court and directed the Clerk of Court to enter judgment in the case to the extent, if any, the Clerk of Court had not done so.

A motion to reconsider under Local Rule 7.1(g) is the "functional equivalent" of a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. *DuBose v. Kelly*, 187 F.3d 999 (8th Cir. 1999). Requests to file such motions are granted "only upon a showing of compelling circumstances." D. Minn. LR 7.1(g); *Transclean Corp. v. Bridgewood Services, Inc.*, 134 F. Supp. 2d 1049 (D. Minn. 2001). A motion to reconsider should not be employed to relitigate old issues, but to "afford an opportunity for relief in extraordinary circumstances." *Dale and Selby Superette & Deli v. United States Dept. of Agriculture*, 838 F.Supp. 1346 (D. Minn. 1993).

The Court has reviewed the long and complicated procedural history of this file. The Court finds and concludes that the Plaintiffs have not shown the compelling circumstances necessary to justify their request. Because the Plaintiffs have not shown compelling or extraordinary-circumstances as required by Local Rule 7.1(g), the Court has denied Plaintiffs' request to file a motion to reconsider.

D.W.F.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Ronald Richard Johnson and Dee Lundberg Johnson,

Plaintiffs,

v.

City of Shorewood, and its Mayor in his official capacity; City of Minnetonka, and its Mayor in her official capacity; Riley-Purgatory-Bluff Creek Watershed District, and the Chair of its Board of Managers in his official capacity; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner & Koppelman, Inc., a corporation; Highland Villa Builders Inc., a corporation; United States of America; Corps of Engineers, being sued as the Corps of Engineers of the United States; The Honorable Louis Caldera, Secretary of the United States Army in his/her official capacity or his successor; Lt. General Joseph N. Ballard, the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity,

Defendants.

Civil No. 00-1281 (DWF/SRN)

ORDER

(Filed Feb. 10, 2003)

All claims having been resolved by this Court's Orders of July 11, 2001 (Doc. No. 161), and October 10, 2001 (Doc. No. 177), and there being no further matters pending before the Court, the Court hereby directs the Clerk of Court to enter judgment in the above-entitled matter.

Dated: February 10, 2003 /s/ Donovan W. Frank
DONOVAN W. FRANK
Judge of United States
District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Ronald Richard Johnson and Dee Lundberg Johnson,

Plaintiffs,

v.

City of Shorewood, and its Mayor in his official capacity; City of Minnetonka, and its Mayor in her official capacity; Riley-Purgatory-Bluff Creek Watershed District, and the Chair of its Board of Managers in his official capacity; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner & Koppelman, Inc., a corporation; Highland Villa Builders Inc., a corporation; United States of America; Corps of Engineers, being sued as the Corps of Engineers of the United States; The Honorable Louis Caldera, Secretary of the United States Army in his/her official capacity or his successor; Lt. General Joseph N. Ballard, the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity,

Defendants.

Civil No.
00-1281 (DWF/SRN)

ORDER

(Filed Oct 10, 2001)

This matter is before the Court upon Plaintiffs' objections to Magistrate Judge Susan Richard Nelson's

Report and Recommendation dated August 3, 2001, recommending that the Highland Defendants' motion for summary judgment be granted in part, all claims arising from the prior state court litigation be barred by collateral estoppel and should be dismissed with prejudice; all remaining claims against the Highland Defendants either are unique or are supplemental state law claims over which the Court should decline to exercise jurisdiction, and such claims should be dismissed without prejudice. The Court has conducted a *de novo* review of the record. 28 U.S.C. § 636(b)(1); Local Rule 72.1(c).

Based upon the Court's review of the record, review of the arguments and submissions of the parties, and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

ORDER

1. Magistrate Judge Susan Richard Nelson's Report and Recommendation dated August 3, 2001 (Doc. No. 165), is **ADOPTED**.

2. The Highland Defendants motion for summary judgment (Doc. No. 148) is **GRANTED** in part. All claims arising from the prior state court litigation are barred by collateral estoppel and are **DISMISSED WITH PREJUDICE**. All remaining claims against the Highland Defendants either are unripe or are supplemental state law claims over which the Court declines to exercise jurisdiction, and such claims are **DISMISSED WITHOUT PREJUDICE**.

Dated: October 10th, 2001

/s/ Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

RONALD RICHARD JOHNSON and DEE LUNDBERG JOHNSON,

Plaintiffs,

vs.

CITY OF SHOREWOOD; CITY OF MINNETONKA; RILEY-PURGATORY-BLUFF CREEK WATERSHED DISTRICT; TRIVESCO, a partnership; and its partners ROBERT H. MASON, INC., a corporation; HIGHLAND PROPERTIES, INC., a corporation; and STEINER & KOPPELMAN, INC., a corporation; HIGHLAND VILLA BUILDERS INC., a corporation; the UNITED STATES; the CORPS OF ENGINEERS OF THE UNITED STATES; the Secretary of the United States Army in his/her official capacity, HONORABLE LOUIS CALDERA, or his successor; and the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity, LT. GENERAL JOSEPH N. BALLARD, or his successor,

Defendants.

Case No. 00-CV-1281 (DWF/SRN)

REPORT AND RECOMMENDATION

(Filed Aug. 03, 2001)

This matter is before the Court upon motion of Defendants Highland Properties, Inc., and Highland Villa Builders, Inc. (collectively "the Highland Defendants") to dismiss all claims against them or in the alternative for summary judgment. Because the parties have submitted materials outside the pleadings in connection with this motion, the Court will treat the motion as one for summary judgment. Fed.R.Civ.P. 12(b).

Plaintiffs Ronald and Dee Johnson ("the Johnsons") claim in essence that a number of governmental and private entities acted together to deprive the Johnsons of rights guaranteed under federal law, particularly their right to just compensation for taking of property. The Johnsons allege that the Highland Defendants participated in developing property near the Johnsons' property and that in so doing the Highland Defendants contributed to flooding on the Johnsons' property. In two earlier Reports and Recommendations, this Court held that the claims against all Defendants other than the Highland Defendants should be dismissed on jurisdictional or procedural grounds. The District Court adopted those Reports and Recommendations by order dated July 11, 2001. The reasoning of the earlier Reports and Recommendations applies with equal force to the claims against the Highland Defendants. The Johnsons have not shown that the Highland Defendants violated either 28 U.S.C. § 1983 or 28 U.S.C. § 1985. The Johnsons' remaining claims against the Highland Defendants either are barred by collateral estoppel, are unripe, or are supplemental state law claims over which this Court should decline to exercise jurisdiction.

The Johnsons raise two additional issues warranting brief consideration. First, the Johnsons assert in their motion papers that the Highland Defendants and others

violated federal environmental laws and regulations. These allegations have no bearing upon the present motion, however, because they do not appear in the Johnsons' Complaint as amended, and this record in any case contains no evidence of such violations other than conclusory statements in the Johnsons' affidavits. Finally, at oral argument counsel for the Johnsons expressed concern about an ambiguity in the District Court's order adopting the earlier Reports and Recommendations. The Court has reviewed the District Court's order, which seems to adopt the Reports and Recommendations in their entirety, and has found no ambiguity requiring clarification.

Based on the foregoing, and on all the files, records and proceedings hearing, **IT IS HEREBY RECOMMENDED THAT:**

1. The Highland Defendants' Motion for Summary Judgment be GRANTED in part. All claims arising from the prior state court litigation are barred by collateral estoppel and should be DISMISSED with prejudice. All remaining claims against the Highland Defendants either are unripe or are supplemental state law claims over which the Court should decline to exercise jurisdiction, and such claims should be DISMISSED without prejudice.

Dated: August 3, 2001

/s/ Susan Richard Nelson
SUSAN RICHARD NELSON
United States Magistrate Judge

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

RONALD RICHARD JOHNSON and DEE LUNDBERG JOHNSON,

Plaintiffs,

vs.

CITY OF SHOREWOOD; CITY OF MINNETONKA; RILEY-PURGATORY-BLUFF CREEK WATER SHED DISTRICT; TRIVESCO, a partnership; and its partners ROBERT H. MASON, INC., a corporation; HIGHLAND PROPERTIES, INC., a corporation; and STEINER AND KOPPELMAN, INC., a corporation; HIGHLAND VILLA BUILDERS, INC., a corporation; the UNITED STATES; the CORPS OF ENGINEERS OF THE UNITED STATES; the Secretary of the United States Army in his/her official capacity, HONORABLE LOUIS CALDERA or his successor; and the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity, LT. GENERAL JOSEPH N. BALLARD or his successor,

Defendants.

Case No. 00-CV-1281 (DWF/SRN)

REPORT AND RECOMMENDATION

(Filed May 18, 2001)

This matter is before the undersigned United States Magistrate Judge upon motions of Defendant Riley-Purgatory-Bluff Creek Watershed District ("the District") and of Defendants Trivesco, Robert H. Mason, Inc., Highland Properties, Inc., and Steiner & Koppelman, Inc. (collectively "Trivesco") for summary judgment. These matters have been referred to the undersigned pursuant to 28 U.S.C. § 636 and Local Rule 72.1. (Docket No. 105).

The Court, in a Report and Recommendation dated May 3, 2001, dismissed a number of claims against other Defendants, and the reasoning underlying that result generally is applicable to the claims against the District and Trivesco as well. This discussion accordingly will focus on facts and issues raised in the District's and Trivesco's motions that the Court did not address at length in the earlier Report and Recommendation.

Plaintiffs Ronald and Dee Johnson ("the Johnsons") claim that the District and Trivesco, along with the other Defendants, took actions contributing to flooding on the Johnsons' property since 1984. The District has regulatory jurisdiction over the watershed containing the Johnsons' property. In 1984, The District issued permits allowing the City of Shorewood to construct a ponding basin near the Johnsons' property, and that construction led to the flooding about which the Johnsons complain. The District in May 2000 also issued a permit authorizing the City of Shorewood to construct a bituminous trail near a road abutting the Johnsons' property. The District has not attempted to take title to any part of the Johnsons' property, and the record shows no District regulation constraining the Johnsons' use of their property other than a prohibition on building within the 100-year flood plain. In a 1993 case in Minnesota state court involving the

Johnsons, the court specifically held that the District's prohibition on building did not constitute a regulatory taking compensable under the federal or state constitution.

Trivesco is a partnership involved in the Waterford property development in the City of Shorewood. Trivesco presently owns an outlot of that development, Outlot C, which borders the Johnsons' property. The Johnsons allege that Trivesco breached a contract to sell Outlot C to the Johnsons, imposed "secret" restrictive covenants on the development of Outlot C, and otherwise acted in such a way as to interfere unlawfully with the use of the Johnsons' property. The Johnsons also allege that Trivesco individually and in conjunction with other Defendants participated in planning decisions which ultimately led to the flooding of the Johnsons' property.

The Johnsons assert causes of action against the District and Trivesco pursuant to 42 U.S.C. §§ 1983 and 1985 and a number of state common law theories. The Court earlier held that the Johnsons had shown no actionable violation of federal civil rights laws with respect to various other Defendants, and the record for these motions compels the same conclusion. The Johnsons continue to rely extensively on *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687 (1999), and other regulatory takings cases, but the collateral estoppel effect of the state court judgment forecloses any regulatory takings claims arising from the flooding of the Johnsons' property in 1984. Any subsequent takings, including takings resulting from increased flooding and takings related to the construction of the bituminous trail, are not ripe for federal adjudication because the Minnesota state courts have not denied those claims. *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997). Although the Johnsons

insist that further state court litigation would be futile, the only argument they offer in support of that proposition is that they received no compensation in the earlier state court proceedings. The Johnsons have a right only to "just" compensation, however, and the Johnsons received no monetary award for the value of their land because a jury found that the taking had not reduced the value of the Johnsons' property. The Johnsons here have shown no reason to believe that they will not receive an adequate hearing on or just compensation for any later takings claimed in the Minnesota courts.

The Johnsons also have not shown any other violation of federal constitutional or statutory law sufficient to sustain a claim under 42 U.S.C §§ 1983 and 1985. The record contains no evidence that either the District or Trivesco participated in a conspiracy to deprive the Johnsons of any federally protected right, as required for claims under § 1985 and, with respect to Trivesco, under § 1983. *See Johnson v. Outbound Marine Corp.*, 172 F.3d 531, 536 (8th Cir. 1999) (holding that a party who is not a state actor cannot be subject to liability under § 1983 in the absence of a showing of that party's willful participation with a state actor in violating the plaintiff's rights). As indicated in the first Report and Recommendation, the Johnsons point to no specific facts establishing that the District's actions violated a federal due process standard or a federal equal protection standard. And, although the Johnsons argue for the first time in their motion papers that the Defendants violated their rights under various federal environmental laws, this record does not establish that the District or Trivesco violated any duty owed to the Johnsons under those laws.

The only potentially viable causes of action against the District and Trivesco, then, arise entirely under Minnesota law. Despite the lack of a federal question after disposition of the federal civil rights claims, both the District and Trivesco request that this Court exercise supplemental jurisdiction over the Johnsons' state law claims and enter judgment in favor of the District and Trivesco on the merits. Given the posture of this case, however, concerns of comity outweigh a desire for judicial economy. The Johnsons' state law claims inevitably will lead to determinations of the validity of a state court judgment and of title to real property, both of which are matters more within the competence of the state than the federal courts. Furthermore, the Johnsons may attempt to assert their unripe takings claims in state court, which would involve the District and Trivesco regardless of whether the other state law claims against the District and Trivesco are dismissed. Judicial economy accordingly may be better served by dismissing all state law claims without prejudice and allowing the Johnsons to combine all remaining state law issues in a single proceeding.

Based on the foregoing, and on all the files, records and proceedings herein, **IT IS HEREBY RECOMMENDED THAT**:

The District's Motion for Summary Judgment (Docket No. 97) and Trivesco's Motion for Summary Judgment (Docket No. 122) be GRANTED in part. All claims arising from the prior state court litigation are barred by collateral estoppel and should be DISMISSED with prejudice. All remaining claims against the District and Trivesco either are unripe or are supplemental state law claims

over which the Court should decline to exercise jurisdiction, and such claims should be DISMISSED without prejudice.

Dated: May 18, 2001

/s/ Susan Richard Nelson
SUSAN RICHARD NELSON
United States Magistrate Judge

* * *

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

RONALD RICHARD JOHNSON and DEE LUNDBERG JOHNSON,

Plaintiffs,

vs.

CITY OF SHOREWOOD; CITY OF MINNETONKA; RILEY-PURGATORY-BLUFF CREEK WATERSHED DISTRICT; TRIVESCO, partnership; and its partners ROBERT H. MASON, INC., a corporation; HIGHLAND PROPERTIES, INC., a corporation; and STEINER AND KOPPELMAN, INC., a corporation; HIGHLAND VILLA BUILDERS, INC., a corporation; the UNITED STATES; the CORPS OF ENGINEERS OF THE UNITED STATES; the Secretary of the United States Army in his/her official capacity, HONORABLE LOUIS CALDERA or his successor; and the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity, LT. GENERAL JOSEPH N. BALLARD or his successor,

Defendants.

Case No. 00-CV-1281 (DWF/SRN)

REPORT AND RECOMMENDATION

(Filed May 3, 2001)

Plaintiffs Ronald and Dee Johnson ("the Johnsons") began litigating issues related to this case ten years ago. The Johnsons originally claimed in Minnesota state court that Defendant City of Shorewood ("Shorewood") had taken the Johnsons' property without payment of just compensation. The Johnsons maintain, even after several state court proceedings, that they still have not received just compensation. This result, according to the Johnsons, occurred because a collection of municipal governments, real estate developers, and federal and state agencies participated in a conspiracy to deprive the Johnsons' of their legal rights. The United States and its agencies and officials named as Defendants (collectively "Federal Defendants") have moved to dismiss all claims against them. The two municipalities named as Defendants, Shorewood and the City of Minnetonka (collectively "Municipal Defendants"), each have moved for summary judgment on all claims against them. The Johnsons in turn have moved to amend their Complaint to include twenty additional defendants and several additional claims. For the reasons discussed below, the Court recommends that the claims against the Federal Defendants be DISMISSED, that the Municipal Defendants' motions for summary judgment be GRANTED in part, that the remaining claims against the Municipal Defendants be DISMISSED, and that the Johnsons' motion to amend be DENIED.

I. Background

The facts pertinent to the motions at issue are as follows. The Johnsons purchased approximately twenty acres of property within Shorewood in 1981. In 1984, Shorewood constructed a road and ponding area near the

Johnsons' property with the consents of the U.S. Army Corps of Engineers and the Riley-Purgatory-Bluff Creek Watershed District. This project has caused flooding on the Johnsons' property since 1984. The Johnsons eventually brought suit against Shorewood in Minnesota state court, arguing that the flooding constituted a taking of their property compensable under the federal and state constitutions. The state court, in 1993, held that Shorewood's project resulted in a permanent physical taking of a certain portion of the Johnsons' property and that no regulatory taking took place. The state court accordingly issued a writ of mandamus compelling Shorewood to conduct eminent domain proceedings and to establish the compensation owed to the Johnsons. That result was affirmed on appeal. *Johnson v. City of Shorewood,* No. CX-93-2452 (Minn.Ct.App. May 11, 1994), *review denied* (Minn. July 15, 1994).

Shorewood complied with the state court's order and made a monetary award. The Johnsons returned to state court to challenge the amount of the award, and the Johnsons also attempted to challenge the scope of the taking defined in the first proceeding. The state court held that the Johnsons could not relitigate the scope of the taking, precluded the Johnsons from introducing evidence of other takings related to the flooding of their property, and adopted a jury finding that the flooding had not reduced the market value of the Johnsons' property, The result of the second proceeding also was affirmed on appeal in its entirety. *City of Shorewood v. Johnson,* No. C5-97-1525 (Minn.Ct.App. April 21, 1998). A third state court case, this time against the City of Minnetonka, was dismissed without prejudice because the Johnsons had not

joined parties who in the court's view were necessary to the litigation. No appeal was taken from that dismissal.

This case represents the Johnsons' attempt to cure the defects in the third state court case and bring claims against all necessary parties. Federal jurisdiction is predicated upon the presence of the United States as a defendant, 28 U.S.C. § 1346, and upon the assertion of federal statutory causes of action pursuant to 42 U.S.C. §§ 1983 and 1985. The Federal Defendants have moved to dismiss, *inter alia*, on jurisdictional grounds, and the Municipal Defendants have moved to dismiss, *inter alia*, on procedural grounds. The Court will address only the procedural and jurisdictional issues because they are dispositive and, thus, need not reach the merits of the claims.

II. The Federal Defendants' Motion to Dismiss

Although the Complaint does not clearly state the amount of damages the Johnsons seek from the Federal Defendants, the motion papers and statements at argument indicate that the Johnsons will request an amount greater than $10,000. This Court lacks subject matter jurisdiction over claims against the Federal Defendants for damages in that amount, 28 U.S.C. § 1346(a)(2). Exclusive jurisdiction over such claims is vested in the United States Court of Federal Claims, 28 U.S.C. § 1491(a)(1), even if the plaintiffs request equitable relief in addition to damages. *V.S. Ltd. P'ship v. Dept. of Hous. and Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000). The district court, pursuant to 28 U.S.C. § 1631, has the authority to transfer claims properly before the Court of Federal Claims. However, the Johnsons have withdrawn their request for such a

transfer, and in that circumstance, the most appropriate action is to dismiss the claims for damages against the Federal Defendants without prejudice[1]. *V.S. Ltd. P'ship*, 235 F.3d at 1113.

The only claim against the Federal Defendants over which this Court arguably has jurisdiction is for a violation of the Freedom of Information Act, 5 U.S.C. § 552. The Johnsons allege that the Federal Defendants in 1993 failed to comply with their request for production of documents pursuant to the Freedom of Information Act, and money damages are not available for such a violation. *Thompson v. Walbran,* 990 F.2d 403, 405 (8th Cir. 1993) (per curiam). Claims for violations of the Freedom of Information Act must be brought within six years of the violation. 28 U.S.C. § 2401(a). The Johnsons did not assert their Freedom of Information Act claim within the limitations period, and that claim accordingly should be dismissed with prejudice.

III. The Municipal Defendants' Motions for Summary Judgment

Defendants City of Shorewood and City of Minnetonka have moved for summary judgment on similar grounds.

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[1] Some of the allegations against the Federal Defendants could be construed as tortious and thus within the district court's jurisdiction under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2670 *et seq.* An FTCA claim, however, requires the denial of an administrative claim for relief with the appropriate federal agency prior to commencement of a district court action. *Id.* at § 2675(a). The Johnsons have submitted no evidence that the United States has denied relief for any claim cognizable under the FTCA.

Both Municipal Defendants argue that the Johnsons' claims against them are procedurally barred. The Municipal Defendants' position is valid, at least with respect to the claims brought pursuant to 42 U.S.C. §§ 1983 and 1985.

42 U.S.C. § 1985 provides a cause of action for persons injured through a conspiracy to deprive them of a federally protected right or privilege. In response to a motion for summary judgment, a plaintiff relying upon this cause of action must produce evidence showing the existence of a "meeting of the minds of the alleged conspirators." *Rouse v. Benson,* 193 F.3d 936, 943 (8th Cir. 1999). This record contains a great deal of evidence, but it contains no evidence sufficient to support a finding of a conspiracy to violate any right the Johnsons may have under federal law. The affidavits submitted from former mayors of Shorewood, persons who presumably would be in a position to know of a conspiracy against the Johnsons, say nothing about an understanding between any of the Defendants concerning the Johnsons. The actions of the Defendants show no collective purpose, and the Johnsons' speculation concerning such a purpose does not allow the conspiracy claims against the municipalities to survive summary judgment.

The Johnsons have a cause of action under 42 U.S.C. § 1983 against any person who deprives them of a federally protected right under color of state law. The Johnsons' § 1983 claims based upon the taking of their property[2],

[2] The record does not show the existence of any potential constitutional violation by the Municipal Defendants other than the alleged taking of the Johnsons' property without just compensation. Although the Johnsons have alleged violations of their procedural and substantive due process rights and of their right to equal protection of the laws,

(Continued on following page)

however, are barred because those claims either were fully litigated in the earlier state court proceedings or are not ripe because they have not been presented to the state court. With respect to the earlier state court proceedings, the state court judgment has the same effect in the federal courts as it would under Minnesota law. *Lommen v. City of East Grand Forks,* 97 F.3d 272, 274 (8th Cir. 1996). Minnesota law allows a defendant to invoke principles of collateral estoppel against a plaintiff who was a claimant in an earlier proceeding when the matter at issue is identical to that in a prior case, a final determination on the merits exists, and the plaintiff had a full opportunity to be heard in the prior case. *Aufderhar v. Data Dispatch, Inc.,* 452 N.W.2d 648, 650 (Minn. 1990). The Johnsons complain that the state court litigation left them with nothing for the value of their land; however, the Johnsons cite no authority indicating that all takings are compensable regardless of the value of the property taken. The state court proceedings definitively established the extent of the physical taking, the lack of a regulatory taking, and the amount of damages to the Johnsons. All claims arising out of the state court litigation accordingly are barred under principles of collateral estoppel.[3]

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the Johnsons have pointed out no defects in the procedures available to them under state law, the Johnsons have not shown that any substantive right protected under the due process clause has been violated, and the Johnsons have not shown that the actions of the Defendants were arbitrary or capricious or in any other way violated their rights under the equal protection clause.

[3] The Johnsons contend that the state judgment is void based on frauds allegedly perpetrated on the state court and that this Court therefore need not recognize that judgment. As a general matter, however, a federal court may not declare that a state court judgment is

(Continued on following page)

With respect to any alleged takings occurring after the state court litigation, the Johnsons may assert claims for such takings in federal court only after exhausting available remedies in state court. *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997). Any claims for takings occurring subsequent to the state court litigation are not ripe because the Johnsons have neither attempted to obtain relief in state court nor shown that the procedures available in state court are inadequate. *Id.*

IV. Supplemental Jurisdiction and the Johnsons' Motion to Amend

A federal court has jurisdiction to hear state law claims arising from a case or controversy over which it otherwise has jurisdiction. 28 U.S.C. § 1367. The Johnsons have asserted a number of state law causes of action against both the Federal Defendants and the Municipal Defendants over which this Court could exercise jurisdiction, but this Court may dismiss such claims if it has dismissed all claims over which it has original jurisdiction. *Id.* at § 1367(c)(3). Most of the Johnsons' state law claims involve the adjudication of contract rights and other interests in real property, a process which is most appropriately handled in state rather than federal court. Given the other impediments to a federal action, including a preexisting state court judgment and a failure to exhaust

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void or otherwise undermine the state court's holding. *Lemonds v. St. Louis County*, 222 F.3d 488, 492-93 (8th Cir. 2000). If the Johnsons believe the state court judgment is void, they may apply to the state court for relief from the judgment pursuant to Minn.R.Civ.P. 60.02.

state court remedies, a dismissal of the Johnsons' supplemental claims without prejudice is warranted.

The Johnsons' proposed amendments do not change this analysis. The only proposed new cause of action under federal law is for an infringement of the Johnsons' free speech rights. The Johnsons claim that the various Defendants threatened the Johnsons with prosecution and thereby interfered with the Johnson' ability to communicate freely with the government. The Johnsons, however, do not allege that their ability to petition the government for redress of grievances in fact has been compromised, and the amount of past litigation related to this dispute demonstrates that the Johnsons were able to exercise all freedoms protected under the First Amendment. The other proposed amendments involve claims against the United States over which this Court lacks jurisdiction, unexhausted takings claims which are not ripe, and state law claims which would be available in a subsequent state court action. The Johnsons' motion to amend accordingly will be denied.

Based on the foregoing, and on all the files, records and proceedings herein, **IT IS HEREBY RECOMMENDED THAT**:

1. The Federal Defendants' Motion to Dismiss or for Summary Judgment (Docket No. 20) be GRANTED. All claims against the Federal Defendants with the exception of claims under the Freedom of Information Act should be DISMISSED without prejudice for want of jurisdiction, which lies exclusively in the United States Court of Federal Claims. The Freedom of Information Act claim also should be DISMISSED with prejudice based on the applicable statute of limitations.

2. The City of Shorewood's Motion for Summary Judgment (Docket No. 57) and the City of Minnetonka's Motion for Summary Judgment (Docket No. 46) be GRANTED in part. All claims arising from the prior state court litigation are barred by collateral estoppel and should be DISMISSED with prejudice. All remaining claims against the City of Shorewood and the City of Minnetonka either are unripe or are supplemental state law claims over which the Court should decline to exercise jurisdiction, and such claims should be DISMISSED without prejudice.

3. The Johnsons' Motions to Amend (Docket Nos. 25 and 75) and Motion to Continue Deadlines (Docket No. 67) be DENIED.

Dated: May 3, 2001

/s/ Susan Richard Nelson
SUSAN RICHARD NELSON
United States Magistrate Judge

* * *

STATE OF MINNESOTA **DISTRICT COURT**
FOURTH JUDICIAL
COUNTY OF HENNEPIN **DISTRICT**

Dated: JANUARY 05, 2000

NOTICE OF ENTRY OF JUDGMENT

GARY A VAN CLEVE
7900 XERXES AVENUE S
SUITE 1500
BLOOMINGTON MN 55431

IN RE:
CITY OF SHOREW00D

vs **File Number:** DC CD 000002344

JOHNSON, RONALD, R

You are hereby notified that on this date **JUDGMENT** was **ENTERED** in the above-entitled matter.

DATE OF JUDGMENT : JANUARY 05, 2000

Mark S. Thompson
Judicial District Administrator
Hennepin County Courts

In the United States Court of Federal Claims

Case No. 01-465L
(Filed: November 4, 2003)

****

RONALD RICHARD JOHNSON *
and DEE LUNDBERG JOHNSON, *
Plaintiffs, *

v. *

THE UNITED STATES OF AMERICA, *
Defendant. *

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OPINION

***BASKIR*, Judge.**

In response to the Plaintiffs' Complaint alleging a taking and related claims originating in the "wetlands" designation of their property, and flooding caused by a state "taking," the United States filed a Motion to Dismiss and/or for Summary Judgment raising the statute of limitations, subject-matter jurisdiction, collateral estoppel, and similar defenses. The Court had an oral argument on the Defendant's motion on November 3, 2003. At the oral argument, the Defendant raised a variety of defenses, as it did in its papers; we address the principal ones in our opinion below.

After extensive briefing and oral argument, we grant the Defendant's Motion to Dismiss, in part, reserving the matter of Plaintiffs' claim of breach of an implied-in-fact contract.

The Plaintiffs have included, throughout their pleadings, new claims and factual assertions, but do not do so in the proper format of an amended complaint. The Defendant's motion was directed solely at the claims in the Complaint, and oral argument was limited solely to that motion.

If the Plaintiffs wish to pursue these new claims they are, of course, free to file a new complaint in an appropriate court. **If the Plaintiffs wish to amend their Complaint filed in this Court, they have until December 18, 2003, to file a motion seeking leave to file an amended complaint.** The proposed amended complaint is to conform to the rules of this Court and shall not restate claims which have been rejected in this opinion. The Government is, of course, free to respond to this motion as it sees fit.

BACKGROUND

In 1981, the Plaintiffs, Ronald Richard and Dee Lundberg Johnson, purchased a 20-acre parcel of land in Hennepin County, Minnesota, in the city of Shorewood (Johnson property). The Plaintiffs use the land as a hobby farm and live close by. A drainage ditch runs from the northeast corner to the southwest corner of the property. After it exits the property, the ditch is crossed by a road berm and joins with a control pond that is located on property belonging to the city of Shorewood. Much of the Plaintiffs' Complaint relates to the construction of this control pond, the road berm, and the subsequent flooding upon their property that it caused.

The Johnson property is listed as wetland on the National Wetland Inventory (NWI) map. The Johnsons

dispute this designation. The NWI map for the area in which the Johnson property is located was created from aerial photographs taken in May of 1980.

In 1984, the city of Shorewood and Trivesco, a commercial developer, began developing the area to the south of the Johnson property. Trivesco and an agent for the city of Shorewood requested authorization from the U.S. Army Corps of Engineers (Corps), under the Clean Water Act, to place fill in a wetland area in order to accommodate residential development. The Corps responded that the proposed work was already covered by an existing nationwide permit, issued in 1982, that authorized the filing of "headwaters wetlands," and, therefore, did not require an individualized review. The Corps administers § 404 of the Federal Water Pollution Control Act (Clear Water Act) in the State of Minnesota. 33 U.S.C. § 1344 and 33 C.F.R. Parts 320-331.

Also in 1984, the city built a road berm and a control pond on city property next to the Johnson land both for aesthetic reasons for the nearby development, and to serve as a collection point for storm water runoff. The pond construction included a pond control structure which was designed to maintain its water level. However, despite this, the pond extends onto the Johnson property, especially during heavy rainfall.

LITIGATION HISTORY

There have been several cases filed in both state and federal court regarding the Johnson property, which we summarize below.

In 1991, the Johnsons brought suit against the city of Shorewood and various other parties in Minnesota State Court, alleging a taking under both the United States and State of Minnesota Constitutions. *Johnson v. City of Shorewood, et. al.*, No. 91-18099 (Minn. D. Ct. 1993). After trial, the court found that a physical taking had occurred, due to Shorewood's construction of the control pond structure, and issued a writ of mandamus to compel condemnation proceedings. However, the court rejected the Johnsons' claim of a regulatory taking. *Id.* slip op. at 5. The court awarded costs and attorney fees to the Plaintiffs.

In an unpublished opinion, the Court of Appeals of the State of Minnesota affirmed the trial court's ruling. *Johnson v. City of Shorewood, et. al.*, No. CX-93-2452 (Minn. App. 1994).

Subsequently, the city of Shorewood filed a condemnation action in Minnesota State Court. The court-appointed commissioners found damages to the Johnson property in the amount of $5,000. The Johnsons appealed these findings to the State District Court and obtained a jury trial. The jury found that the Johnsons were entitled to $65,000 ($63,000 in clean up damages and $2,000 for the value of the permanent easement taken by the city). However, the court set aside $2,000 of the award as inconsistent with the jury's findings of fact. The Court of Appeals of Minnesota denied the city's appeal. *City of Shorewood v. Johnson, et. al.*, No. C5-97-1525 (Minn. App. 1998). The final result of this litigation was an award to the Johnsons of over $183,000 (in compensation, interest, costs and fees). *City of Shorewood v. Johnson*, order filed November 5, 1999 (Minn. D. Ct.).

In 2000, the Johnsons filed suit in the U.S. District Court for the District of Minnesota against the United States Government, the Corps, and various other defendants including local governments, local officials, and private developers. The Plaintiffs' claims included physical takings, regulatory takings, FOIA violations, common law torts, and constitutional torts. *Johnson v. City of Shorewood, et. al.*, No. 00-CV-1281 (2001). The District Court dismissed the complaint against the United States and other federal defendants for lack of jurisdiction. *Id.* slip op. at 2.

The Plaintiffs appealed this ruling to the U.S. Court of Appeals for the Eighth Circuit on August 10, 2001. At oral argument, the Plaintiffs' Counsel stated that this appeal is currently pending before the Eighth Circuit.

In the instant suit, filed with this Court on August 9, 2001, the Plaintiffs allege both physical and regulatory takings of their property by the Government. They claim the Government took their property physically by flooding it and committed a regulatory taking by designating it a wetland flood plain. Contained within Plaintiffs' Complaint are also various claims that sound in tort against the U.S. Army Corps of Engineers, including allegations that the Corps made misrepresentations. Further, the Plaintiffs allege that the Corps and other Government actors committed unauthorized acts by both breaking and failing to enforce laws. Finally, the Plaintiffs allege that the Government breached an implied-in-fact or express contract to revise its wetland maps in order to reflect their assertion that the Johnson property is not a wetland.

* * *

II. Plaintiffs' claims that sound in tort, or alternatively, are based upon acts not authorized by Congress, fail because this Court lacks subject matter jurisdiction over them.

The Plaintiffs allege several times in their Complaint that the Corps and the United States engaged in misrepresentations. *See, e.g.*, Complaint (August 9, 2001), pp. 5 & 8. The Plaintiffs' claims include an allegation that the Corps made misrepresentations to the state trial court regarding the wetland status of their property, during their takings lawsuit, filed in 1991. The Plaintiffs allege further misrepresentations later in their filings, which we incorporate in this ruling. *See, e.g.*, Plaintiffs' Memorandum in Opposition to Defendant's Motions (May 20, 2002), p. 35.

The jurisdiction of this Court extends to "any claim against the United States found either upon the Constitution. . . . or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2003). Because the Plaintiffs' claims for misrepresentation and other wrongful acts sound in tort, this Court lacks jurisdiction to hear them. *See, e.g., Brown v. United States*, 105 F.3d 621, 623 (1997). The Counsel for the Plaintiffs conceded this point at oral argument. Further, this Court lacks jurisdiction in takings cases where the gravamen of the complaint is not the taking, but rather the fraudulent nature of the alleged taking. *Id.*

As to the Plaintiffs' claims of illegal conduct, including statutory violations, this Court similarly lacks jurisdiction to hear claims of unauthorized Government conduct as a basis of a taking claim without a previous test of validity of the issues under the Administrative Procedures Act (5 U.S.C. § 702 and ff). *See Florida Rock Industries, Inc. v.*

United States, 791 F.2d 893, 899 (Fed. Cir. 1986). Because there has been no such determination here, this Court lacks jurisdiction to hear these claims.

III. Plaintiffs' claim of breach of an implied-in-fact contract by Defendant fails to state a claim for which relief can be granted.

Contracts with the United States may be either express or implied; this Court possesses jurisdiction over both types of contracts. 28 U.S.C. § 1491(a)(1) (2003). The Plaintiffs allege a "Contract with the Corps of Engineers to Correct the Wetland Maps." Complaint (August 9, 2001) p. 4. However, the Plaintiffs fail to allege with specificity the elements of a contract. Even if we take their allegations as true, a contract was not formed between the Johnsons and the Corps. The Johnsons allege that:

> On and about 1996, the Corps agreed that it would change the designation of Johnsons' property as a "wetland" on its hydrological maps, if, a federal wetland delineator, of the Corps' choosing were to demonstrate that the flooded property was not a wetland before installation of the dam.

Complaint, (August 9, 2001) p. 4. The Johnsons produce no written agreement or other documentary evidence to support this claim.

The Federal Circuit has stated that,

> any agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the Government, specifically: mutual intent to contract including an offer and an acceptance, consideration, and a

> Government representative who had actual authority to bind the Government.

Trauma Serv. Group v. United States, 104 F.3d 1321, 1326 (Fed. Cir. 1997). **Because the Plaintiffs have not perfected their allegations, and identified with particularity supporting evidence, the Court will allow them until December 18, 2003, to amend the Complaint on this point.**

CONCLUSION

Because we have ruled in favor of the Government on the foregoing grounds, we need not address the Defendant's arguments that the Plaintiffs' claims are barred by collateral estoppel, that they lack standing to bring this suit, or that 28 U.S.C. § 1500 bars this Complaint.

Counts I and II of the Complaint are dismissed, as are the rest of the allegations contained within the Complaint with the exception of Plaintiffs' claim of breach of an implied-in-fact contract by the Defendant. Consequently, the Clerk is directed not to enter judgment for the United States until further notice.

IT IS SO ORDERED. /s/ Lawrence M. Baskir
LAWRENCE M. BASKIR
Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 01-465 L

RONALD RICHARD JOHNSON, AND DEE LUNDBERG JOHNSON,

v.

JUDGMENT

THE UNITED STATES

Pursuant to the court's Opinion, filed April 1, 2004,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Brian Bishop
Clerk of Court

April 5, 2004 By: [Illegible]
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $255.00.

CITY OF SHOREWOOD, petitioner, Appellant,
v.
Ronald R. JOHNSON, et al., Respondents,
and
FIRST BANK NATIONAL ASSOCIATION,
Southdale office, Defendant.

No. C5-97-1525.
Court of Appeals of Minnesota.
April 21, 1998.

Hennepin County District Court File No. CD2344

Considered and decided by DAVIES, Presiding Judge, TOUSSAINT, Chief Judge, and KALITOWSKI, Judge.

UNPUBLISHED OPINION

DAVIES, Judge.

In this condemnation proceeding, appellant argues that the trial court erred by denying its motions for JNOV or a new trial. Respondents allege the court erred by denying their motion for contempt and by granting appellant's motion to exclude loss-of-access evidence. We affirm.

FACTS

In 1984, appellant City of Shorewood built a pond and control structure on city property. The control structure blocks a ditch that drains abutting property owned by respondents Ronald R. and Dee L. Johnson. Although the control structure is designed to maintain the pond's water level at a 910-foot elevation, the pond regularly rises to a level of 914 feet, flooding a portion of respondents' property. In addition, there was temporary flooding

to a higher level as a consequence of an inadequate road culvert.

In 1991, respondents sued appellant, alleging that the flooding constituted a compensable taking of their property. The trial court found there had been an irreversible physical taking of all property below 914 feet and ordered appellant to initiate condemnation proceedings. We affirmed that order. *Johnson v. City of Shorewood,* No. CX-93-2452 (Minn.App. May 17, 1994), *review denied* (Minn. July 15, 1994).

After condemnation commissioners awarded respondents $2,000 for the easement value of the land and $3,000 as a "cost-to-cure damage," respondents appealed to the district court. During that appeal, respondents moved to hold appellant in contempt, alleging that, because of a faulty legal description, appellant failed to condemn all property below the 914-foot elevation. The trial court denied the motion. The condemnation matter finally went to trial in 1996. Appellant brought a motion in limine, which the trial court granted, to exclude evidence that the taking deprived respondents of access to the northwest quadrant of their property.

The jury returned a special verdict awarding respondents (1) $2,000 for the easement, (2) $0 for the difference between the pre- and post-takings fair market value of their property, and (3) $63,000 for clean-up damages. Finding that the first two awards were inconsistent, the court held that respondents were not entitled to any damages for the loss of value in their property and entered judgment for $63,000.

The city moved for JNOV or a new trial. The city appeals that denial of its motion, and respondents appeal

the court's denial of their contempt motion and its grant of appellant's motion to exclude loss-of-access evidence.

DECISION

I.

Judgment notwithstanding the verdict (JNOV) shall be granted "if the moving party would have been entitled to a directed verdict at the close of the evidence." Minn.R.Civ. P. 50.02(a). The trial court's decision to deny a motion for JNOV will be affirmed unless "the evidence is practically conclusive against the verdict." *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 507, 232 N.W.2d 236, 239 (1975).

Appellant characterizes the jury's award to respondents as "cost-to-cure" damages and argues that respondents are precluded from collecting such damages because the jury found no difference between the pre- and post-takings market value of respondents' property. *See Bulletin Publ'g Corp. v. City of Cottage Grove*, 379 N.W.2d 685, 687 (Minn.App.1986) (when cost of restoring property to natural condition is less than difference in pre- and post-takings value, property owner is entitled to collect restoration costs and nothing more); *see also Alexandria Lake Area Serv. Region v. Johnson*, 295 N.W.2d 588, 590 (Minn.1980) (restoration damages awarded in certain cases to restore remaining property to usable condition).

In a partial takings case, the correct measure of damages is

> the difference between the fair market value of the entire piece of property immediately before

> the taking and the fair market value of the remainder of the property after the taking.

State by Humphrey v. Strom, 493 N.W.2d 554, 558 (Minn.1992).

> To determine the fair market value of property in a condemnation proceeding "[a]ny competent evidence may be considered, if it legitimately bears upon the market value."

County of Ramsey v. Miller, 316 N.W.2d 917, 919 (Minn.1982) (quoting *State v. Malecker,* 265 Minn. 1, 5, 120 N.W.2d 36, 38 (1963)).

Here, the court allowed the jury to consider clean-up costs because the cost of cleaning up damage from flooding "legitimately bears upon the market value" of respondents' property. Appellant argues that, because the jury found no diminution in the pre- and post-takings market value of respondents' property, respondents are precluded from collecting clean-up damages. We disagree, for the jury's response to the third special verdict question was not necessarily predicated on its response to the prior questions. The jury may have found there was no diminution in market value from the taking only because respondents *prevented* a diminution in market value by restoring their property to its pre-flood condition, incurring significant costs in doing so. If respondents had *not* cleaned up the damage, the property's fair market value would have been diminished because potential buyers would have subtracted clean-up expenses from the price they would pay for the property. The trial court did not misinterpret the rule of damages and did not err in denying appellant's motion for JNOV.

II.

Appellant argues that the trial court, in denying its new trial motion, left uncorrected two errors of law. Where a court's new-trial decision is based on an error of law, a de novo standard of review applies. *Halla Nursery, Inc. v. Baumann-Furrie & Co.,* 454 N.W.2d 905, 910 (Minn.1990).

Appellant first claims the court erroneously admitted evidence of damages that occurred above the 914-foot elevation contour. But in a partial taking,

> [t]he owner is entitled to compensation *not only for the part taken but also for damage to the part not taken.* This is implicit in the rule given to jurors that they are to measure the damages by the difference in the market value of the entire tract before the taking and the market value of the tract remaining.

State by Lord v. North Star Concrete Co., Parcel Channel Change No. 26, 265 Minn. 483, 488, 122 N.W.2d 118, 122-23 (1963) (emphasis added). If flooding of respondents' property resulted in damage to trees, vegetation, or soil outside the flooded area, the jury was entitled to consider that damage in determining the amount of compensation to be paid. Here there was evidence of such damages.

Appellant also argues that the trial court should have instructed the jury on respondents' duty to mitigate damages. A trial court has broad discretion in determining jury instructions. *State Farm Fire & Cas. Co. v. Short,* 459 N.W.2d 111, 113 (Minn.1990). An appellate court will reverse only when a jury instruction is an abuse of discretion. *Alholm v. Wilt,* 394 N.W.2d 488, 490 (Minn.1986).

Although a property owner in a takings case "must exercise reasonable diligence to minimize his damages, the extent of the duty imposed by the rule depends on the facts of each case." *State by Lord v. Casey,* 263 Minn. 47, 54, 115 N.W.2d 749, 755 (1962). Here, Ronald Johnson testified that after the flooding occurred he spent more than 3,400 hours removing dead trees and debris and that his time was worth $20 per hour. The city presented testimony that the ditch could more reasonably have been cleaned up with a bulldozer and reseeded at a cost of $4,500.

When reviewing a jury verdict, we "consider the evidence in a light most favorable to the verdict and sustain that verdict if possible, on any reasonable theory of evidence." *Dang v. St. Paul Ramsey Med. Ctr. Inc.,* 490 N.W.2d 653, 659 (Minn.App.1992), *review denied* (Minn. Dec. 15, 1992). The record supports respondents' claim that the fragile nature of their property precluded the use of heavy machinery to remove the dead trees and debris caused by the flooding. On this record, the jury could have found that respondents' valuation of the time and effort to clean up the property was reasonable and rejected appellant's claim that these costs were unreasonable. The trial court did not err in refusing to instruct the jury on mitigation of damages, for the issue was not mitigation. Rather, the issue was the reasonableness of the means chosen to restore the property.

It was not error to deny the new trial motion.

* * *

Affirmed.

STATE OF MINNESOTA	**DISTRICT COURT**
COUNTY OF HENNEPIN	**FOURTH JUDICIAL DISTRICT**

City of Shorewood, **Plaintiff,**	**Case No. CD2344**
vs.	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT**
Ronald R. Johnson and Dee L. Johnson,	
Defendant.	(Filed Oct. 23, 1996)

The above-entitled matter came on for a Jury Trial on the 14th day of October, 1996 before the undersigned, a Judge of the District Court, Hennepin County Government Center, Minneapolis, Minnesota.

Larry D. Martin, Esq. and Timothy J. Keane and Sharna A. Wahlgren, Esq. appeared for and on behalf of the Petitioner, the City of Shorewood and Daniel Shulman and David Shulman, Esq. appeared for and on behalf of the Respondents, Ronald R. Johnson and Dee L. Johnson.

The matter was submitted for consideration by the Jury on October 22, 1996. The Jury returned answers on a Special Verdict Form on October 23, 1996 and the Court adopted its verdict to make the following:

FINDINGS OF FACT

The Court adopts as facts, the following Findings of the Jury dated October 23, 1996:

1. What amount of money, if any, will compensate the Johnsons for the easement actually taken?

ANSWER: $2,000.00

2. What damages, if any, do you award the Johnsons as the difference between the fair market value of the entirety of their property before the City's taking and the fair market value of the remainder of their property after the City's taking?

ANSWER: $ -0-

3. What damages, if any, do you award the Johnsons as the reasonable cost of clean-up arising out of the City's taking of their property?

ANSWER: $63,000.00

CONCLUSIONS OF LAW

1. The Jury, finding that the difference between the fair market value of the entirety of the property before the City's taking and the fair market value of the remainder of the property after the City's taking was zero, the Respondents are not entitled to any damages for the loss of value in their property. However, the Jury found that the Respondents are entitled to $63,000.00 as a reasonable cost of clean-up arising out of the City's taking of their property.

IT IS HEREBY ORDERED:

1. That the Respondents, Ronald R. Johnson and Dee L. Johnson are entitled to judgment against the Petitioner, the City of Shorewood, in the amount of $63,000.00 together with their costs and disbursements herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Judgment will be stayed for 30 days from the date hereof.

BY THE COURT

Dated: Oct. 24, 1996

/s/ Allen Oleisky
Allen Oleisky
Judge of District Court

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

City of Shorewood,

Petitioner

vs.

Ronald Johnson and
Dee Johnson, et al.,

Respondents.

TRIAL TRANSCRIPT
VOLUME 10-22-96

D.C. File CD-2344

The above-entitled matter came duly on for hearing before the Honorable Allen Oleisky, Judge of the above-named Court, on the 22nd day of October, 1996, at Courtroom 1853, Hennepin County Government Center, Minneapolis, Minnesota.

Witness: Ronald P. Peterson

* * *

A. OK. Until 1984, we did not have any of the wetland-delineation manuals that we have today. There are two manuals, one is the 1987 Corps of Engineers Wetland-Delineation Manual and the other is the 1989 Federal Manual for Identifying and delineating Jurisdictional Wetlands.

At the current time, the '89 manual is not in use. The '87 manual is the one that is applied both by state and federal agencies under the law today. In 1984 –

Q. Let me stop you right there. You're going a little bit fast for me. In 1987, the Corps of Engineers prepared a manual?

A. That is correct.

Q. And this manual helps people like yourself to delineate wetlands?

A. It is the guidance that we – all wetland delineators have to go by in identifying and delineating wetlands today.

Q. That started in 1987?

A. That is correct.

* * *

Q. Yeah. Now, you said you – you made an Affidavit saying that when you talk about Mr. Johnson excavating the ditch, you made an Affidavit, didn't you, saying that in your opinion Mr. Johnson would need a permit from the Corps of Engineers in order to do the work that he did in that ditch?

A. Based on three letters from the Corps, yes.

Q. Well, let me show you Exhibit 26 in evidence. Do you see that?

A. Yes, I do.

Q. Have you seen it before?

A. Yes, I have.

Q. And that says that Mr. Johnson, the work that Mr. Johnson was doing in his ditch was exempt. Right?

A. Mr. Johnson –

Q. Is that what it says?

A. Yes. Not the work that he did in 1995. If he were to do that work after the date of this exemption, it would have been exempt.

Q. Yeah. OK. So –

[58] A. He did the work and then applied for the exemption.

Q. And he got the exemption. Right?

A. Yes.

Q. So he didn't need a permit, did he, to do the work you said he needed to do?

A. He needed to get confirmation from the Corps that he didn't need a permit.

Q. He got that confirmation?

A. He got – He got confirmation that he has an exemption for ditch maintenance.

Q. You said he needed a permit, right –

A. Yes.

Q. – in your sworn Affidavit?

A. Based on what the Corps said and based on what I thought.

Q. And you were wrong, weren't you?

A. I think he needed a permit for what he did because I think I saw evidence that he went beyond the original profile of the ditch.

Q. The Corps gave him an exemption. Right?

A. Yes, they did.

Q. They said he didn't need a permit?

A. That's for the ditch maintenance.

Q. You said he did?

[59] A. Yes – and I still think he needed one.

Q. So you think the Corps was wrong?

A. Yeah, I do. I don't think they visited the site.

Q. Now, in your report do you have any drawings like this, ditch-profile drawings?

A. No, sir, I don't.

Q. OK. Now, as I understand your testimony, you think that – you will agree that if the Johnson property was not – was not a wetland before the taking and is now a wetland, you would agree that the Johnsons have sustained damage, would you not?

A. Yes.

Q. OK. We'll write damage (indicating) pre-taking, wetland – Oh, no. Wetland and after wetland. Under those circumstances, you would agree that Mr. Johnson – that the Johnsons have sustained damage. Correct?

A. Correct.

MR. SHULMAN: I'll move the easel.

BY MR. SHULMAN:

* * *

A. Yes, I do.

Q. OK. Now, that means, does it not, that if an area was once a wetland and because, for example, of drainage is no longer a wetland, the Corps does not intend to assert jurisdiction over it?

A. I don't think that's exactly what it says. What it says is that if it's converted to dry land, that they would not exercise jurisdiction over it.

Q. That means, does it not, that if the ditch on the Johnsons' property had drained their property so that the property no longer possessed the features of a wetland, the Corps of Engineers would not assert – would not have asserted jurisdiction over it as a wetland, isn't that true?

A. Such that it would not have a predominance of hydrophytic vegetation, yes, that would be true.

Q. You're aware that the Corps of Engineers has not asserted jurisdiction over this property, [66] are you not?

A. They most certainly have.

Q. Now, you – And this (indicating) is a regulation that you didn't look at in your work. Right?

A. I have not looked at this regulatory guidance letter, no.

Q. You didn't even know about it before today, did you?

A. The Corps doesn't keep it on their – on their list. It's so old and expired – expired the date of the taking.

Q. You didn't know about it before today. Right?

A. No. I've seen more recent versions of it. I didn't know about this old one, though, but it doesn't change my conclusion.

Q. Now, you gave some testimony about what you think – how you think the City would apply its zoning – I'm sorry, its wetlands ordinance. Do you remember that testimony?

A. No. I remember testifying as to what the plain language of the ordinance says.

Q. Oh, you didn't give any views about how the City would apply it?

A. I don't recall. I don't think so.

[67] Q. Now, you were here in court for part of the testimony of Mr. Nielsen. Correct?

A. Yes.

Q. OK. Do you remember Mr. Nielsen saying that if somebody as qualified, for example, as Mr. Frank had come in with a six – with a 6-lot proposal and had demonstrated that this – that the area involved was not wetland, then it's possible that Mr. Nielsen would have approved it? Do you remember that testimony?

A. Yes.

Q. And were you also here when Mr. Nielsen testified that the only reason any portion of the Johnsons' property appears as a designated wetland is as a result of the City ordinance?

A. I don't know that I recall that, no.

Q. Were you here when he testified that if someone were to dispute that the property was in fact a wetland, that he would look to the DNR and Corps of Engineers for a determination of whether it really was a wetland?

A. I think I recall that testimony, yes.

Q. And I think you said that if somebody's property is designated as a wetland under the ordinance and the person wishes to build on the [68] property, one of the things that the person can do is to ask for a variance?

A. That's correct.

Q. And a variance is permission to do something that's different from what's in the ordinance but it's granted under the ordinance. Right?

A. Correct.

MR. SHULMAN: I have no further questions. Thank you.

THE COURT: Any redirect, Mr. Martin?

MR. MARTIN: Yes, Your Honor.

REDIRECT-EXAMINATION

BY MR. MARTIN:

Q. Mr. Peterson, when you were asked about this document – Let me first ask you. Let me first ask you. You were asked whether or not – Mr. Shulman said that the Corps has not exerted jurisdiction over this property. Has the Corps extended its jurisdiction over the lowland of Mr. Johnson's property?

A. Without question.

Q. How do you know that is true?

A. Because if the Corps – if someone applies for a permit or asks for an exemption for an [69] activity in a wetland that – or an area that the Corps determines it doesn't have jurisdiction over, it issues a no-jurisdiction letter, it does not issue an exemption or does not issue a permit.

By virtue of the fact that they required a permit for some of the activities Mr. Johnson proposed and that they issued an exemption letter for the ditch maintenance, they are in doing so indicating without question that they exercise jurisdiction over the wetland and if he comes in to do other activities in that wetland, they will be requiring permits.

Q. So without question that is a Corps of Engineers wetland?

A. Without question.

Q. And with respect to this language that Mr. Shulman has referred to in this letter, what do we call this letter – a regulatory letter?

A. Regulatory guidance letter.

* * *

Q. Those letters indicated that the property was a wetland?

A. Yes, they do.

MR. MARTIN: I've got three letters I want collectively marked as one exhibit.

(Exhibit 117 marked for identification.)

BY MR. MARTIN:

Q. Mr. Peterson, I'm handing you what's been marked as Exhibit 117. Are those the letters that you reviewed in your research from the Corps of Engineers?

A. That is correct.

Q. And what language in those letters specifically leads you to believe that the Corps believed the Johnsons' property was a wetland?

A. Well, there are three letters. One is February 7th, 1994, one is from March 2nd, 1993, one is from March 17th, 1993. So two in March of '93 and one a year later.

March 2nd, 1993 letter indicates – well, it indicates that we believe you may need an [78] individual permit of the army, Section 404 permit for the ditch cleanout work that he was proposing. It also references at some length the agricultural ditch-maintenance exemption and describes what has to be shown to get it and also it spells out explicitly the recapture provision. I can read that if you like.

Q. No. Why don't you move on to the next letter.

A. The March 17th, 1993 letter says: "As stated in our March 2nd, 1993 letter, we reviewed the information you provided about the ditch cleanout and requested removal about an existing culvert and control structure. With the information we have, we still believe you may need an individual department of the army Section 404 permit for cleanout. The proposed project appears to involve a discharge of excavated material and grading of existing spoil banks in wetland and it may affect a substantial area of wetland."

Then it goes on again to explain that some agricultural ditch maintenance work can qualify for an exemption for a permit though there are strict guidelines that apply, and it again indicates that the effected wetland must not be [79] converted to new uses.

Q. Then the last letter?

A. The February 7th, 1994 letter says that: "As stated in our March 2nd and March 17th, 1993 letters, we still believe that you need an individual department of the army Section 404 permit for cleanout of the ditch. The proposed project appears to involve an excavation in a ditch through a wetland and possibly grading of existing spoil banks in wetland and it may affect a substantial area of wetland.

According to the National Wetland Inventory map and other sources, the effected area appears to have been a wetland before the dam and road construction" –

Q. Could you read a little bit louder?

A. Sure. "According to the National Wetland Inventory map and other sources, the effected area appears to have been a wetland before the dam and road construction in the mid 1980s and it appears to remain a wetland today."

Q. That's the Army Corps of Engineers writing?

A. That is correct.

MR. MARTIN: Your Honor, I'd offer Exhibit 117.

[80] MR. SHULMAN: No objection, Your Honor.

THE COURT: It will be received.

MR. MARTIN: That's all I have, Your Honor.

RECROSS-EXAMINATION

BY MR. SHULMAN:

Q. May it please the Court, those letters that you refer to, those are all after 1984, aren't they?

A. Yes, they are.

Q. And they're – At that time, they're all at the time of when the pond-control structure had dammed the ditch. Right?

A. The letters were drafted, yes, after that – after the pond was constructed, yes.

Q. Right. That pond – So at that time, that taking made that property a wetland, didn't it?

A. No.

Q. You – After you got – you saw those letters, that's when you filed your Affidavit with the Court. Right?

A. I'm sorry. Could you run that by me again?

Q. You saw those letters and then – and you read them to say that Mr. Johnson would need a [81] permit, right, to clean out his ditch?

A. I think that's fair interpretation of the letters, yes.

Q. So what you did was you tattled on Mr. Johnson to the Court. Right? You submitted an Affidavit saying in your opinion based on the letters he'd need a permit?

A. I would –

MR. MARTIN: Objection, Your Honor, relevance.

THE COURT: Sustained.

BY MR. SHULMAN:

Q. Based on those letters, you told the Court, did you not, you said: "Based upon my experience with the regulations of the U.S. Army Corps of Engineers, the Wetland Conservation Act and the Riley/Purgatory/Bluff Creek Watershed District, permits would be required under each regulatory program for ditch maintenance and alteration activities to be carried out on the subject property." That's what you said. Right?

A. That's correct.

Q. And you also told the Court that you believed that Mr. Johnson was doing work without permits?

[82] A. I know him to be.

Q. And you told that to the Court. Right?

A. Yes.

Q. OK. And your opinion that he needed a permit was wrong, wasn't it?

A. He needed an exemption. He needed some indication that he didn't need a permit.

Q. Your statement to the Court that he needed a permit was wrong, isn't that true?

A. No, it wasn't wrong.

Q. He didn't get a permit, did he?

A. He got an exemption.

Q. Right, he got an exemption. Now, you also said that in the area of the six lots there were no trees as shown on the map that was done in Mr. Bopray's report. Do you remember that testimony?

A. Yes, I do.

Q. Just so we're clear on where the six lots are, that's this area (indicating). Right?

A. That's my understanding, yes.

Q. There are trees here, aren't they, shown on Mr. Bopray's work?

A. There were some shown along the ditch, yes. I'm sure there's trees in other areas, too.

[83] Q. Right. There is – For example, 211, we find that right here (indicating). Right?

A. Yes.

Q. And that's a – that's a sumac, an upland tree. Right?

A. Yes.

Q. So that's shown in the area of the six lots, isn't it?

A. Yes.

Q. You were wrong about that, weren't you?

A. All I said was there didn't appear to be a lot of trees or any trees shown in the area of the six lots.

Q. There are trees there, aren't there?

A. Oh yeah. I'm sure there are other trees all the way down there.

Q. Now, it's also, I think your testimony, that all of the area that's shown here within wetland boundaries was, is, and always will be wetland?

A. That's not what I said.

Q. Is it your testimony that all of this area was and is wetland?

A. Yes.

Q. Do you know there's been development in here?

[84] A. Yes.

MR. SHULMAN: Nothing further.

THE COURT: Mr. Martin, any other questions?

MR. MARTIN: Yes, just one, Your Honor.

REDIRECT-EXAMINATION

BY MR. MARTIN:

Q. There seems to be confusion on this permit, exemption business, Mr. Peterson. That exemption was for agricultural purposes. Correct?

A. Correct.

Q. To develop on this property and to do any work on that wetland, you need a permit, isn't that true?

A. That is correct. That's what the Corps stated specifically in their letters.

MR. MARTIN: OK. Thank you, Mr. Peterson. That's all I have.

MR. SHULMAN: No, nothing further.

THE COURT: Thank you, Mr. Peterson.

THE WITNESS: Thank you.

* * *

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

City of Shorewood,

Petitioner

vs.

Ronald Johnson and Dee Johnson, et al.,

Respondents.

TRIAL TRANSCRIPT

VOLUME 10-17-96

D.C. File CD-2344

The above-entitled matter came duly on for hearing before the Honorable Allen Oleisky, Judge of the above-named Court, on the 17th day of October, 1996, at Courtroom 1853, Hennepin County Government Center, Minneapolis, Minnesota.

* * *

[2] Witness: Mark Steven Parranto

* * *

[64] usually.

Q. Has the Minnesota Department of Natural Resources designated this property as wetland?

A. I can't tell you. I don't know.

Q. You – Your conclusion about the value of the property that you did appraise assumes that prior to the taking in 1984 this property was wetland. Right?

A. The data that I had indicated that it was.

Q. Well, that's –

A. That's what I used.

Q. OK. And if in fact this property were not wetland prior to the taking, that could affect your opinion, could it not?

A. If the data that I had is wrong, then it would affect my opinion or could. Depends on where and how much and a variety of other things.

Q. You were asked – Now, you said that you – in determining that this was wetland, you relied upon the survey – or the report that was done by Mr. Peterson?

A. That was one piece of information that I had.

Q. You were also asked – In fact, if this property were not wetland prior to the time of the taking in 1984, the highest and best use of

* * *

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

City of Shorewood, Court File No. CD 2344

Petitioner, **ORDER AND MEMORANDUM**

vs.

Ronald Johnson and
Dee Johnson, et al.,

Respondents.

The above-entitled matter came on for hearing before the undersigned, Judge of the above-named Court, on October 7, 1996 at the Hennepin County Government Center, City of Minneapolis, County of Hennepin, State of Minnesota.

APPEARANCES WERE AS FOLLOWS:

Larry D. Martin, Esq., appeared on behalf of Petitioner.

Daniel R. Shulman, Esq., and David L. Shulman, Esq., appeared on behalf of Respondents.

The Court having been fully advised in the premises, and based upon all the pleadings and files on record in this matter, **IT IS HEREBY ORDERED:**

1. That Petitioner's Motion In Limine To Exclude Evidence is granted.

2. That Respondents' Motion In Limine To Exclude Evidence is granted.

3. That the attached memorandum is incorporated herein.

BY THE COURT

Dated: Oct. 10, 1996

/s/ Allen Oleisky
Allen Oleisky
Judge of District Court

MEMORANDUM

FACTS

Respondents, Ronald Johnson and Dee Johnson (hereinafter the "Johnsons"), purchased the parcel of land in question (hereinafter the "Property"), located within the City of Shorewood (hereinafter the "City"), in 1981. Situated within the Property is a drainage ditch that runs diagonally from the northeastern corner to the southwestern corner of the Property.

In 1984, in conjunction with the construction of Waterford subdivision, located immediately to the south of the Property, the City constructed a storm sewer collection pond on City property abutting the south boundary of the Property. Despite the City's implementation of a pond control structure, designed to maintain a normal water level in the pond at 910 feet, the elevation of the water in the pond frequently rises to a level where water overflows the pond and backs up onto the Property.

As a result of the frequent flooding of the Property, the Johnsons brought suit against the City seeking a writ of mandamus compelling the City to commence eminent domain proceedings. The Johnsons alleged that actions taken by the City relating to the Johnson's application for plat approval, and relating to the development of property

bordering the Property, amounted to a taking of the Property without just compensation.

In connection with this action, both parties moved the court seeking summary judgment. On May 27, 1993, Honorable Ann Montgomery, Judge of Hennepin County District Court, issued a decision as to the parties' motions for summary judgment. Judge Montgomery granted the City's motion for summary judgment with respect to the Johnson's claim that the City's failure to provide street access to the northwest quadrant of the property via the Waterford development left this portion of the Property, in effect, landlocked. However, due to the court's finding that a genuine fact existed as to whether the flooding on the Property was of such frequency to constitute a taking, the court denied the Johnson's motion for summary judgment.

Upon trial of this case in August 1993, Judge Montgomery found a "physical taking of the Johnson's Property up to an elevation of 914 feet since December 31, 1984. The Johnson's property is expected to flood to this level with sufficient frequency to constitute a permanent physical invasion." Judge Montgomery's Order of August 17, 1993, at p. 5. Judge Montgomery issued a writ of mandamus ordering the City to commence condemnation proceedings. The court also awarded the Johnsons attorneys fees and costs in the matter.

The City appealed the trial court's decision. The Court of Appeals upheld Judge Montgomery's determinations on May 17, 1994. *See, Johnson v. City of Shorewood*, CD 93-2452 (Minn. App. 1994). In July 1994, the Minnesota Supreme Court denied the City's petition for review.

On September 20, 1994, in conjunction with condemnation proceedings, this Court determined that the City

must acquire an easement on the Property for drainage purposes. In addition, the Court ordered that Condemnation Commissioners be appointed to determine the Johnson's damages due to the easement.

On December 18, 1995, the Condemnation Commissioners issued their decision, concluding that the value of the property taken by the City was $5,000.00. The Johnsons have appealed the Commissioner's award and a jury trial date is set for October 14, 1996.

Presently, the parties have filed cross motions in limine to exclude evidence in the upcoming trial. The City's motion seeks to preclude the Johnsons from presenting evidence or argument suggesting that, because the northwest quadrant of the Property is landlocked and inaccessible due to the easement, the Property has diminished in value. In support of their motion, the Johnsons argue that the City must be precluded from presenting evidence or argument suggesting that the City's taking of the Property up to an elevation of 914 feet since December 31, 1984 is not irreversible, or does not constitute a permanent physical invasion.

ANALYSIS

With respect to the City's taking of the drainage easement, the Minnesota Court of Appeals clearly and unambiguously affirmed the trial court's determination that the taking was an irreversible and permanent physical invasion. *See, Johnson v. City of Shorewood*, CD 93-2452, (Minn. App. 1994). Therefore, because this issue has already been properly adjudicated and confirmed by the Court of Appeals, it is the Court's determination that

the City must be estopped from presenting evidence or arguing otherwise.

* * *

Finally, because the issue concerning the pre-ownership wetland designation relating to the Property, and the issue concerning the City's conditions for plat approval, were already adjudicated by Judge Montgomery upon motion for summary judgment, the doctrine of collateral estoppel clearly precludes the introduction of evidence or argument contrary to Judge Montgomery's Order. *See*, Order & Memorandum of May 27, 1993.

CONCLUSION

Based upon the forgoing, the Court hereby grants Petitioner's Motion in Limine to Exclude Evidence and also grants Respondents' Motion in Limine to Exclude Evidence.

STATE OF MINNESOTA

IN SUPREME COURT

CX-93-2452

Ronald R. and Dee L. Johnson,

Respondents,

vs.

City of Shorewood, et al.,

Appellants.

ORDER

(Filed Jul. 15, 1994)

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of the City of Shorewood, et al. for further review be, and the same is, denied.

IT IS FURTHER ORDERED that Ronald and Dee Johnson's motion to accept their untimely response to the petition is granted.

Dated: July 14, 1994

BY THE COURT:

/s/ [Illegible]
Chief Justice

ANDERSON, J. took no part.

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (1992).

STATE OF MINNESOTA

IN COURT OF APPEALS

CX-93-2452

Hennepin County — Randall, Judge
District Court File No. 91-18099

Ronald R. Johnson, et al.,
Respondents,

John F. Bonner, III
Teri Ellen Bentson
Parsinen, Bowman & Levy
100 South Fifth Street
Suite 1100
Minneapolis, MN 55402

vs.

City of Shorewood, et al.,

Thomas B. Humphrey, Jr.
Daniel W. Voss
Larkin, Hoffman, Daly &
Lindgren, Ltd.
1500 Norwest Financial
Center
7900 Xerxes Avenue South
Bloomington, MN 55431

Filed May 17, 1994
Office of Appellate Courts

Considered and decided by Schumacher, Presiding Judge, Lansing, Judge, and Randall, Judge

UNPUBLISHED OPINION

RANDALL, Judge

Respondents Ronald R. and Dee L. Johnson petitioned the trial court for a writ of mandamus to compel appellants City of Shorewood and its city council to commence inverse condemnation proceedings. The trial court found a physical taking had occurred and issued a writ of mandamus to compel condemnation proceedings. The trial court also awarded respondents $33,878.54 in attorney fees, costs, and expenses pursuant to Minn. Stat. § 117.045 (1992). We affirm.

FACTS

In 1981, respondents purchased a 20-acre parcel of land in Shorewood, Minnesota. A drainage ditch runs through the low area of the property. In 1975, the city had conducted a storm water study which proposed that the low area be used as a storm water drainage basin. At the time respondents purchased the land, there was no pond on the property and water flowed through the ditch. In 1984, the city built a control pond on city property next to respondents' property both for aesthetic reasons for a nearby development and to serve as a collection point for storm water runoff. The city also built a pond control structure designed to maintain a normal water level of 910 feet in the pond.

The trial court found that at that level, the pond extended onto respondents' property, and that "[w]ater levels typically exceed the 910-foot elevation and have been observed at an elevation of 911.5 feet during fair weather." In addition, the trial court found:

> 19. Two to three times per year, during major storm events, water in the pond has risen above 914 feet and poured through the top of the pond control structure.
>
> 20. As the elevation of water in the pond rises, more water backs up onto the property.
>
> 21. The pond and pond control structure do not provide any benefit to [respondent's] property.
>
> 22. The pond control structure was designed and constructed to be permanent, but is capable of being removed or altered.

Based upon these findings, the trial court concluded that there has been a physical taking of respondents' property "up to an elevation of 914 feet since December 31, 1984," and that respondents' property "is expected to flood to this level with sufficient frequency to constitute a permanent physical invasion." Appellants challenge this determination and the attorney fee award.

DECISION

I.

Private property may not be taken for public use "without just compensation." U.S. Const. amend. V. The Minnesota Constitution also requires compensation for private property "taken, destroyed or damaged for public use." Minn. Const. art. I, § 13. Whether a taking has occurred is a question of law which this court reviews de novo. *Alevizos v. Metropolitan Airports Comm'n*, 298 Minn. 471, 484, 216 N.W.2d 651, 660-61 (1974); *Thompson v. City of Red Wing*, 455 N.W.2d 512, 516 (Minn. App. 1990), *pet. for rev. denied* (Minn. June 26, 1990).

* * *

The trial court properly found that the taking was enough of a permanent nature to call for constitutional compensation and to issue a writ of mandamus to compel the city to begin inverse condemnation proceedings. We agree and affirm.

II.

Minn. Stat. § 117.045 (1992) entitles landowners to petition for reimbursement of attorney fees upon successfully compelling eminent domain proceedings. *Spaeth*, 344 N.W.2d at 823; *Thompson*, 455 N.W.2d at 518. If mandamus to compel the proceedings is not the appropriate remedy, attorney fees may not be awarded under Minn. Stat. § 117.045. *McShane*, 292 N.W.2d at 260.

Since the trial court found the flooding constituted a permanent physical taking, mandamus is appropriate. Therefore, the award of attorney fees was appropriate under the statute. We affirm the award of attorney fees.

Affirmed.

5-11-94
/s/ [Illegible]

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Court File No. 91-18099

Ronald R. Johnson and
Dee L. Johnson,

Plaintiffs/Petitioners,

vs.

City of Shorewood and the
Shorewood City Council,
said Council consisting of
Mayor Barbara J. Brancel, and
Councilpersons Rob Daugherty,
Daniel Lewis, Kristi Stover
and Robert Gagne,

Defendants/Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above-entitled matter came on for court trial before the Honorable Ann Montgomery, Judge of the above-named Court, on June 22, 1993. John F. Bonner III, Esq., appeared on behalf of the Johnsons. Thomas B. Humphrey, Esq., appeared on behalf of the City of Shorewood and the Shorewood City Council (hereinafter collectively the "City"). Post-trial submissions were received by the Court on July 21 and 28, 1993.

Based upon all the arguments, files, records and proceedings herein, including the stipulated submissions of the parties, the Court makes the following:

FINDINGS OF FACT

1. The Johnsons purchased the parcel of land in question (the "property"), located within the City of Shorewood, in 1981. The property consists of approximately 11 acres of knolls and 9 acres of low, flat land.

2. At the time the Johnsons purchased the property, the land in the low area of the property was composed of marsh-type soils which are unsuitable for development.

3. Prior to the time that the Johnsons purchased the property, the City had designated the low area as wetland. The parties dispute the legality of this designation.

4. A drainage ditch runs diagonally through the low area from the northeastern corner to the southwestern corner of the property. After it exits the property, it continues through a subdivision called Waterford, which lies to the south of the property, and ultimately joins Purgatory Creek. The elevation of the bottom of the ditch where it exits the property at the southwest corner is 902 feet.

5. In 1975, prior to the Johnsons' ownership, a Comprehensive Storm Water Study conducted by the City proposed that the low area of the property be used as a storm water drainage basin for storm sewer runoff from north of the property. The study did not propose that a pond or dam be built in the drainage ditch.

6. At the time the Johnson purchased the property, there was no pond on the property and water flowed freely through the ditch.

7. In 1984, in conjunction with the construction of the Waterford development to the south and west of the property, the City constructed a control pond in the ditch

on City property abutting the south boundary of the property.

8. The purpose of the pond was twofold: (1) to provide an aesthetic feature, and (2) to serve as a collection point for storm water runoff from Waterford so that the water could be directed into the drainage ditch. Ponding of storm sewer runoff allows sediment to settle out of the water, which prevents pollution downstream, and allows the rate of water flow downstream to be controlled to prevent erosion of the water channel.

9. Storm drainage facilities were designed and constructed to direct strom water directly into the pond from three directions: (1) from Muirfield Circle to the northwest, (2) from Waterford Place east of the pond, and (3) from Waterford Place west of the pond. In addition, water flows into the pond through the drainage ditch from the northeast.

10. In conjunction with creating the pond, the City constructed a pond control structure to maintain a minimum level of water in the pond and to control the rate of water flow into the ditch below the pond.

11. Calculations of storm water levels and the design for the pond control structure were submitted by the City to the Riley Purgatory Creek Watershed District which subsequently granted a permit for construction of the pond and pond control structure.

12. Based on the design of the pond control structure and the topography surrounding the pond area, the Watershed District designated a 100-year storm event flood plain at an elevation of 917.1 feet.

13. The 100-year storm event is an engineering design mandate which plans for a rainfall that statistically appears on average once every 100 years. This level must be taken into consideration when designing water-control structures.

14. The Watershed District permit prohibits construction at elevations lower than 919.1 feet, two feet above the 100-year flood plain.

15. Upon receipt of the permit, the pond control structure was installed in accordance with the specifications approved by the Watershed District.

16. As constructed, the pond control structure has three openings through which water can enter the structure from the pond: (1) a six-inch diameter side inlet at the 910-foot elevation, (2) a twelve-inch diameter side inlet at the 911.5-foot elevation, and (3) a thirty-six-inch drop inlet at the 914-foot elevation. Water that enters the structure flows into a culvert and then flows into the preexisting drainage ditch south of the pond.

17. The pond control structure is designed to maintain a normal water level in the pond at an elevation of 910 feet. At that elevation, the pond backups up onto the Johnsons' property.

18. Water levels typically exceed the 910-foot elevation and have been observed at an elevation of 911.5 feet during fair weather.

19. Two to three times per year, during major storm events, water in the pond has risen above 914 feet and poured through the top of the pond control structure.

20. As the elevation of water in the pond rises, more water backs up onto the property.

21. The pond and pond control structure do not provide any benefit to the Johnsons' property.

22. The pond control structure was designed and constructed to be permanent, but is capable of being removed or altered.

CONCLUSIONS OF LAW

1. There has been a physical taking of the Johnsons' property up to an elevation of 914 feet since December 31, 1984. The Johnsons' property is expected to flood to this level with sufficient frequency to constitute a permanent physical invasion.

2. Neither the designation of a 100-year flood plain at 917.1 feet, nor the restriction on building below 919.1 feet constitute a taking of the Johnsons' property. There is no permanent physical invasion or appropriation of the Johnsons' property at these elevations.

3. Further, the restrictions on construction do not constitute a regulatory taking because they do not detrimentally affect the potential uses of the Johnsons' property.

4. Although the pond control structure is "removable," it was constructed as a permanent fixture. Thus, even if the City removes the structure and eliminates the resultant flooding of the Johnsons' property in the future, under *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987), the physical invasion of the Johnsons' property during the period in

which the pond control structure was operational is an irreversible taking which requires compensation.

5. Because the physical taking of the Johnsons' property to elevation 914 feet is irreversible, there is no adequate remedy other than an order of mandamus compelling commencement of inverse condemnation proceedings.

6. The Johnsons have successfully brought an action compelling the initiation of inverse condemnation proceedings and are, therefore, entitled to an award of reasonable attorney fees and costs under Minn. Stat. § 117.045.

ORDER FOR JUDGMENT

1. The City of Shorewood shall immediately commence condemnation proceedings for the purpose of compensating the Johnsons for all damages which arise out of, and reasonably relate to, the taking by the city of the Johnsons' property.

2. The City shall pay to the Johnsons the amount of $33,878.64 as reimbursement for reasonable attorney fees, costs and expenses incurred in bringing this action.

NOTWITHSTANDING GEN. R. PRAC. 125, LET JUDGMENT BE ENTERED IMMEDIATELY.

BY THE COURT:

/s/ Ann Montgomery
Ann D. Montgomery
Judge of District Court

Dated: this 17th day
of August, 1993

MEMORANDUM

Ronald and Dee Johnson petition for a writ of mandamus compelling the City to commence eminent domain proceedings to compensate them for the taking of a portion of their property by flooding due too the construction of the pond and pond control structure. The United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The Minnesota Constitution requires compensation when private property is "taken, destroyed or damaged for public use." Minn. Const. art. I, § 13. The legal standards for determining whether a taking has occurred were discussed at length in an earlier Order in this matter and that discussion is incorporated into this Memorandum. (Order of May 27, 1993.)

The City concedes that there has been water ponded on the Johnsons' property continuously at an elevation of 910 feet since December 31, 1984 and that these circumstances constitute a physical taking to that elevation. The City argues, however, that increases in the water level above 910 feet are only occasional and do not constitute a taking of the property to those higher elevations. "Whether occasional flooding is of such frequency, regularity, and permanency as to constitute a *taking* and not merely a temporary invasion for which the landowner should be left only to a possible recovery of damages is a question of degree, and each case must stand on its own peculiar facts." *Nelson v. Wilson,* 239 Minn. 164, 172, 58 N.W.2d 330, 335 (1953) (emphasis in original); *see also Spaeth v. City of Plymouth,* 344 N.W.2d 815, 822 (Minn. 1984).

Although the pond control structure was designed to maintain a "normal" water level at 910 feet, the water level in the pond is routinely higher than 910 feet. Two to three times each year, high volume runoffs from major storms have increased the water level to at least the 914-foot elevation and it is reasonable to infer that the water level regularly rises to between 910 and 914 feet during storms of low to moderate severity. When storm runoff causes water in the pond to rise to the 914-foot opening of the pond control structure, the water will be swiftly drained away through the large, thirty-six-inch opening at the top of the structure. Thus, the likelihood that water will rise above that level for any significant period of time is slight and should occur infrequently, if at all, in any particular year.

Nevertheless, the Johnsons argue for a ruling that a physical taking of the property has occurred up to the 919.1-foot elevation, the level below which development is restricted based on the 100-year flood event. The Johnsons argue that these restrictions are akin to a physical taking because they are based on the "statistically anticipated" and "inevitable" invasion of water every 100 years. They also argue that the designation of the low area of the property as a flood plain and as part of the City's storm water drainage system is an "appropriation" of that property.

With respect to the Johnsons' first argument, inevitability is not the only criteria which must be met under the *Nelson* test for a physical taking by flood; rather, flooding must be sufficiently frequent, regular and permanent. 239 Minn. at 172, 58 N.W.2d at 335. While the *Nelson* decision states that this test must be applied on a case-by-case basis, *id.*, it is difficult to conceive of any case in which

short-term flooding once every 100 years or so would be considered a permanent physical invasion.

The Johnsons' second argument is based on similarities between their claims and those in *Spaeth v. City of Plymouth,* 344 N.W.2d 815 (Minn. 1984). In *Spaeth,* the City of Plymouth developed a Storm Water Drainage Plan which designated the low area of the plaintiff's land as a ponding area. *Id.* at 817. When property abutting the plaintiff's lot was developed, a dam was built in a drainage ditch in order to create a pond in accordance with the City's drainage plan. *Id.* at 818. By the time of the trial, a large portion of the plaintiff's property had remained flooded by the pond for three years and the flooding was expected to continue. *Id.* at 822. The court held that a portion of the plaintiff's property had been taken and that eminent domain proceedings must be commenced. *Id.*

The Johnsons' argument suggests that the *Spaeth* court held that the entire portion of the plaintiff's property that had been designated either as "the ponding area" or as a "flood plain" had been taken, whether or not it had actually experienced flooding at the time of the decision. The *Spaeth* decision is not clear on *what* portion of the plaintiff's property was taken. The references to the City's drainage plan were made with respect to the issues of permanency and the City's responsibility for the flooding, rather than to the geographical extent of the taking. *See id.* at 820-22. The essential factor supporting the decision that a taking had occurred in *Spaeth* was the occurrence of continuous flooding. *Id.* at 822. The reasoning in *Spaeth* does not compel a conclusion that mere designation of an area as being subject to flooding is sufficient to constitute a physical taking of property without a finding of actual or probable flooding on a frequent basis.

While it is possible that a flood plain designation and the associated restrictions on development could result in a regulatory taking, the Johnsons do not contend that the restrictions on development below 919.1 feet constitute a regulatory taking of their property.

Application of the *Nelson* test to the facts of this case supports a conclusion that flooding on the Johnsons' property from the backup of pond water has occurred, and will continue to occur so long as the pond control structure is in place, with sufficient frequency and regularity at levels up to 914 feet in elevation to constitute a physical taking of the property to 914 feet.

Generally, if a taking has occurred, the proper remedy is a writ of mandamus to institute inverse condemnation proceedings to determine the amount of compensation to be made. *Haeussler v. Braun,* 314 N.W.2d 4, 9 (Minn. 1981). Mandamus shall not issue, however, if the taking or damage is not irreversible and where there is an adequate remedy at law, such as an injunction against enforcement of a regulation or ordinance. *McShane v. City of Fairbault,* 292 N.W.2d 253, 259 (Minn. 1980). The *McShane* court commented that mandamus would interfere with the municipality's discretion to either repeal the regulation that had been found to be a taking or to institute eminent domain proceedings. *Id.*

The City argues that mandamus is similarly inappropriate in this case and that the Court should issue an injunction requiring the City to remove or alter the pond control structure to allow for the free flow of water through the drainage ditch. This proposal does not protect the city's legislative discretion; rather, it makes the choice for them by requiring the City to take affirmative action to

change the status quo. This result is quite different than the outcome in *McShane* where the municipality was enjoined from taking *further* action (enforcing a regulation) until it had decided whether or not to pursue eminent domain proceedings. Defendants argue that they may, in fact, decide to pursue condemnation proceedings instead. An order giving them a choice of complying either with an injunction or a writ of mandamus is inappropriate; such an order could delay prompt relief for the Johnsons.

Further, an injunction is simply not an adequate remedy in this case. The physical taking of the property that has already occurred by continuous flooding at the 910-foot elevation is not "reversible." In *McShane,* the taking that was enjoined was a regulatory taking; the City of Fairbault had imposed development and use restrictions on land below the flight path to the city airport. *Id.* at 255. The qualitative difference between physical and regulatory takings has been recognized by the U.S. Supreme Court which has held that physical invasions are per se takings, while regulations are not takings unless the impact of the regulation on property rights is not justified by the public interests to be served. *Agins v. City of Tiburon,* 447 U.S. 255, 260-61 (1980); *Lucas v. South Carolina Coastal Council,* ___ U.S. ___, 112 S. Ct. 2886, 2893 (1992). Unlike a regulation, once a physical invasion like a flood occurs it is irreversible, even though it may end.

The City may still choose to remove the pond and pond control structure and eliminate the continued taking of the Johnsons' property. This action would be a factor for the condemnation commissioners to consider in determining the amount of damages to be paid to the Johnsons.

Because mandamus will issue in this case, the Johnsons are entitled to an award of attorneys' fees and costs under Minn. Stat. § 117.045 which provides for such reimbursement when a plaintiff successfully brings an action compelling eminent domain proceedings. They are not entitled to full reimbursement, however, because a substantial portion of this case involved claims which were resolved against the Johnsons by summary judgment. *See Spaeth,* 344 N.W.2d at 823.

Counsel for Plaintiffs has requested reimbursement of $43,487.23 for costs and expenses incurred in bringing this action, including attorney and expert fees. (Bonner Aff. dated July 21, 1993 and Bonner Aff. dated August 6, 1993.) A review of the invoices submitted in support of this request reveals that the total amount of attorneys' fees requested by Plaintiffs does not include amounts that have already been paid to Plaintiffs' counsel. (Bonner Aff. dated July 21, 1993, Ex. 1: $62.75 paid 12/31/91, $131.25 paid 2/28/92, $11,497.80 paid 10/29/92, and $120.54 paid 11/30/92.) It appears that this was an error in calculation and that the actual total costs and expenses incurred by Plaintiffs in bringing this action should be $55,299.57.

Plaintiffs were charged $19,832.17 for attorneys' fees and costs for the month of June 1993 and $3336 for expert witness fees for that same period. (Bonner Aff. dated July 21, 1993 and Bonner Aff. dated August 6, 1993.) Those costs and expenses were incurred after the summary judgment order was issued in this action. They were generated almost completely with respect to litigating the physical taking claim for which condemnation proceedings will be compelled and they should be fully reimbursed. In addition, it is appropriate for the City to reimburse the Johnson for one third of the remaining $32,131.40 in fees

and expenses incurred prior to the summary judgment motion. Plaintiffs shall be awarded $33,878.64 for reimbursement of reasonable fees and costs incurred in obtaining a writ of mandamus compelling condemnation proceedings.

ADM

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Court File No. 91-18099

Ronald R. Johnson and
Dee L. Johnson,

Plaintiffs/Petitioners,

vs.

City of Shorewood and the
Shorewood City Council,
said Council consisting of
Mayor Barbara J. Brancel,
and Councilpersons
Rob Daugherty,
Daniel Lewis, Kristi Stover
and Robert Gagne,

Defendants/Respondents.

ORDER

The above-entitled matter came on for hearing before the Honorable Ann Montgomery, Judge of the above-named Court, on Plaintiffs/Petitioners' motion for summary judgment on the liability issues. This motion was originally heard on October 13, 1992 but was withdrawn by agreement of the parties pending settlement discussions. The motion was reargued on April 15, 1993. Teri E. Bentson, Esq., and John F. Bonner III, Esq., appeared on behalf of the Johnsons. Thomas B. Humphrey, Esq., appeared on behalf of the City of Shorewood and the Shorewood City Council (hereinafter collectively the "City").

The court, having considered all the arguments, files, records and proceedings herein,

IT IS HEREBY ORDERED:

1. Plaintiffs' motion for summary judgment on its claim that their Property has been taken without just compensation as a result of Defendants' construction of a culvert, pond and pond control structure in Waterford is DENIED.

2. Summary judgment is GRANTED for Defendants for all claims related to street and utility access to the Northwest Quadrant of Plaintiffs' Property.

3. The third condition stated in Defendants' Resolution No. 42-91 for approval of the Plaintiffs' application for a plat of the South Quadrant of their Property which states:

> 3. At such time as the northwest corner of the property is platted, the applicant shall dedicate the designated wetland portion of the property or provide a drainage and conservation easement over it to the City for protection of the wetland area.

is hereby DECLARED INVALID. Summary judgment is GRANTED for Plaintiffs on this claim.

4. Summary Judgment is GRANTED for Defendants with respect to all other claims related to Resolution No. 42-91.

BY THE COURT:
/s/ Ann D. Montgomery
Ann D. Montgomery
Judge of District Court

Dated: this 27th day
of May, 1993

MEMORANDUM

Plaintiffs/petitioners Ronald and Dee Johnson own approximately twenty acres of undeveloped land (the "Property") in the City of Shorewood. The Johnsons' allege that various actions by the City in response to their application for plat approval for part of the Property, and relating to the development of land surrounding their Property, have resulted in a taking of the Johnsons' Property without just compensation in contravention of the Fifth Amendment to the United States Constitution and Article 1, Section 13 of the Minnesota Constitution. The Johnsons also allege that the conditions the City has imposed on final approval of their plat application are an abuse of its police power. The Johnsons seek declaratory relief and petition for a writ of mandamus compelling the City to commence eminent domain proceedings. The Johnsons have moved for summary judgment.

* * *

II. Issues

5. Did the designation of the Johnsons' field as wetland constitute a taking?

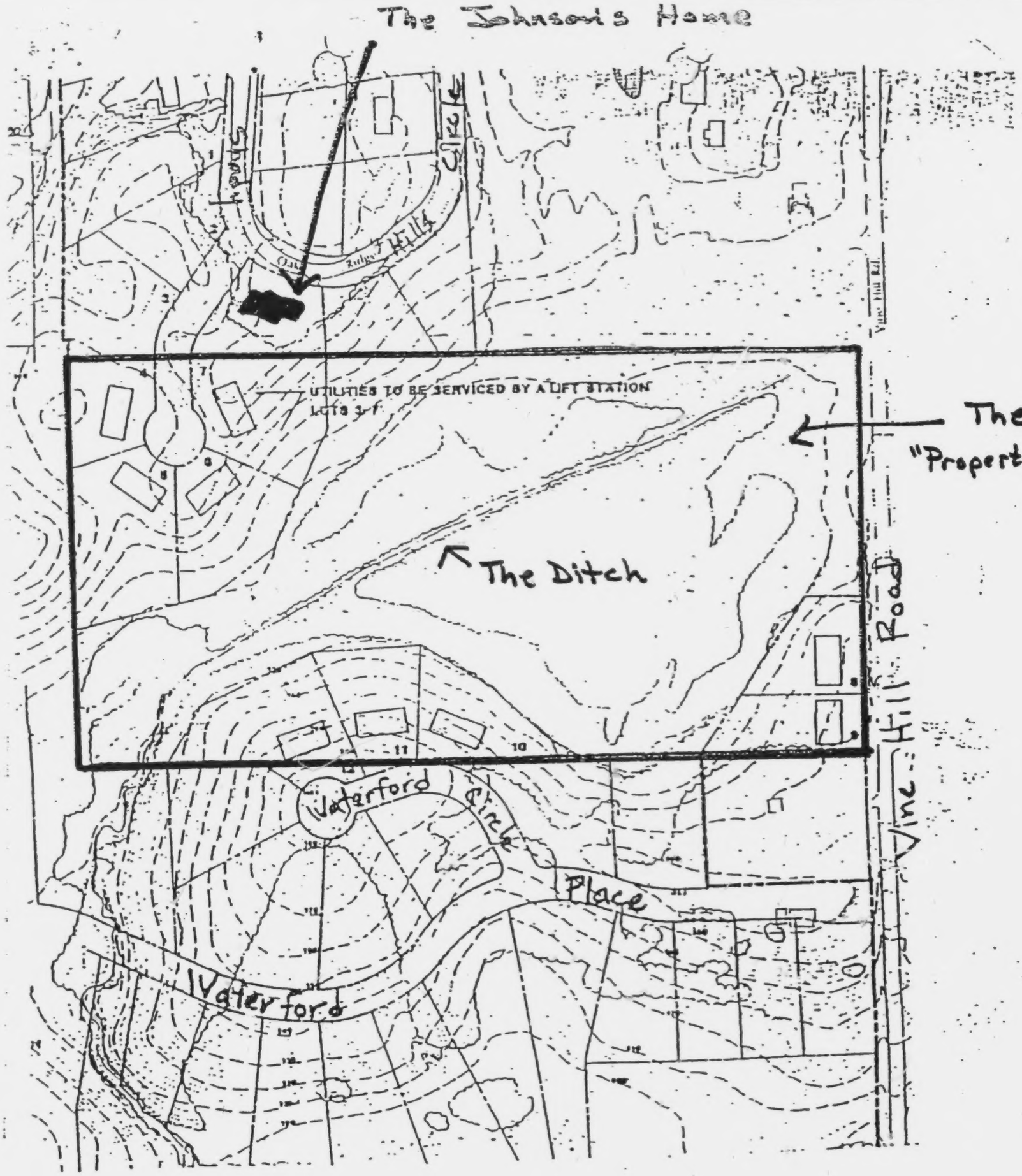
* * *

Designation of the Field as Wetland

The Johnsons have also claimed that the designation of the field as a protected wetland is a taking of their rights to use and develop that portion of their Property. The designation occurred in 1973. (First Bonner Aff. Ex. D; Pls.' Supplemental Mem. in Supp. Summ. J. dated April 12, 1993.) This designation was prior to the Johnsons' purchase of the property in the early 1980's. There is no

basis for arguing that a pre-ownership designation has "taken" any of the property rights that the Johnsons obtained when they purchased the property. Summary judgment is granted for the City on this issue.

* * *



** THE BUILDINGS SHOWN WITHIN THE JOHNSONS' PROPERTY WERE DRAWN FOR PLATTING PURPOSES - THEY DO NOT REALLY EXIST

EXHIBIT A

RESUBDIVISION SKETCH

BEST AVAILABLE COPY

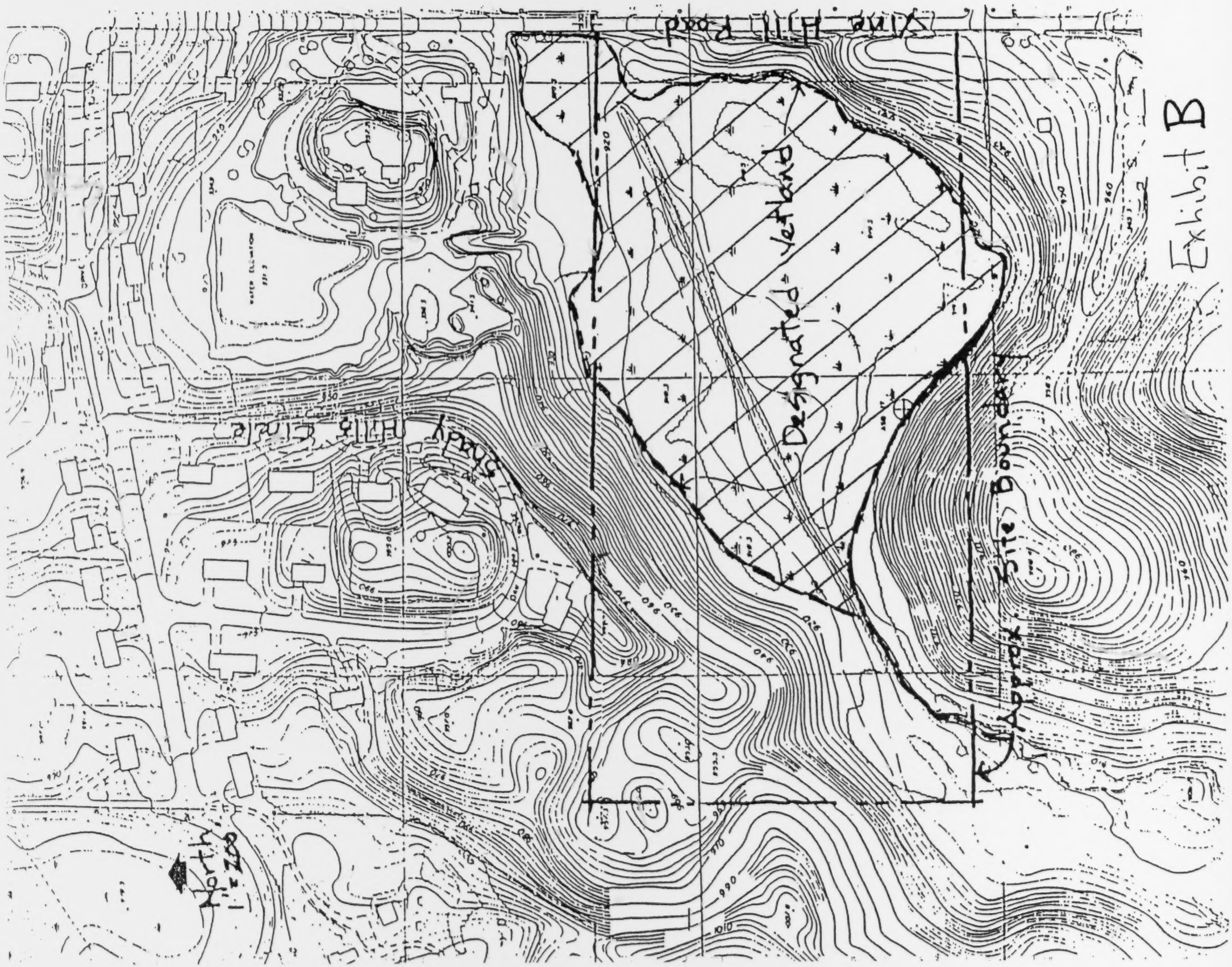


Exhibit B
Approx. Site Boundary
Pleasant Valley Road
Clive Hill Road
Valley Drive
North
1" = 200'

THE JOHNSONS' PROPERTY

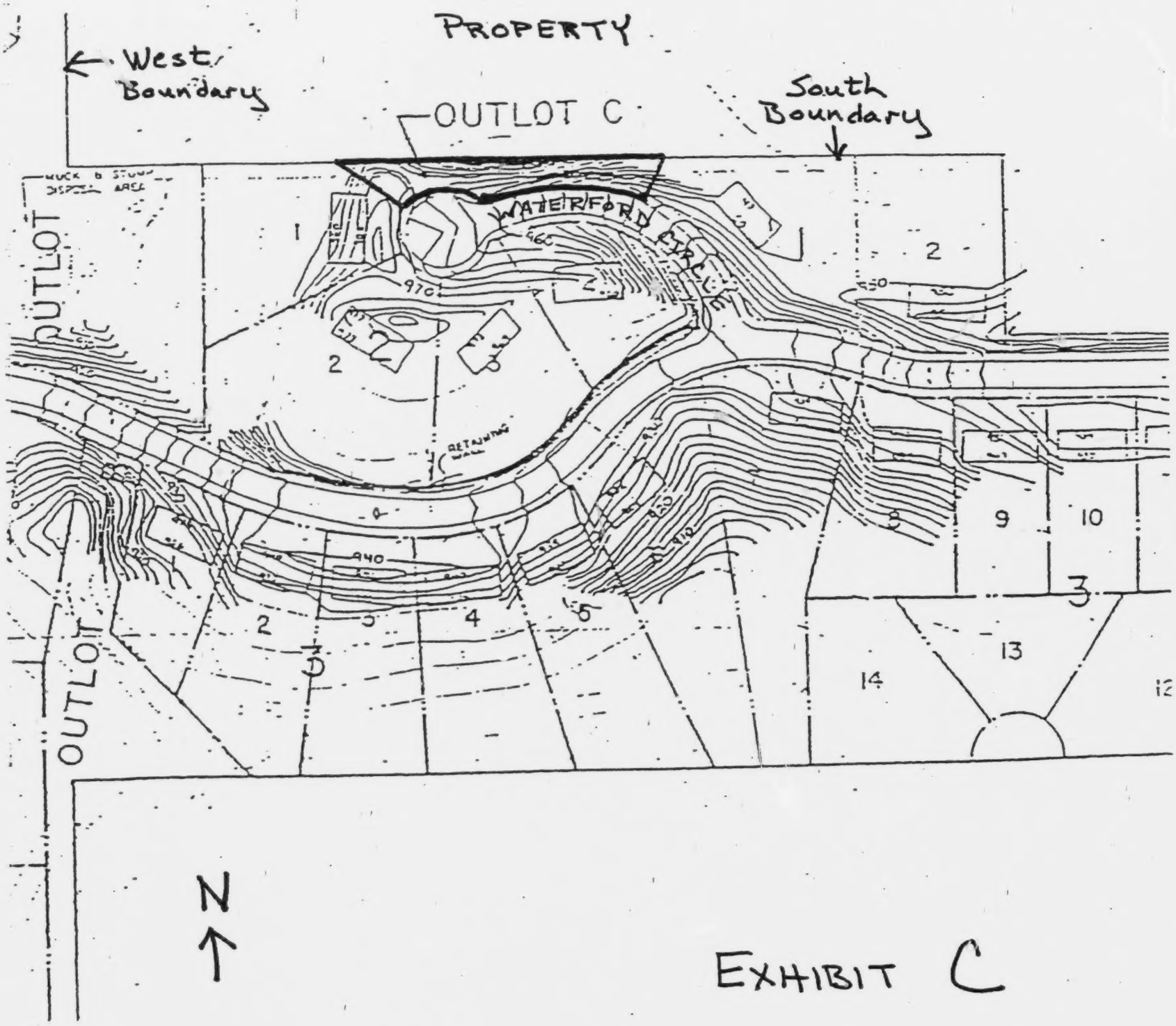


EXHIBIT C

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT

Ronald Richard Johnson,

Plaintiff,

vs.

City of Shorewood,

Defendants.

ORDER

(Filed Feb. 2, 2000)

Court File No. AC 99-7447

The above-entitled matter came on for hearing before the undersigned, one of the Judges of the above-named Court, on the 4th day of January, 2000, upon Plaintiff's motion to amend his complaint and for pretrial conference.

Erick G. Kaardal, Esq. Appeared for and on behalf of Plaintiff. James Susag, Esq. appeared for and on behalf of Defendant.

Based upon the arguments of counsel and upon all the files, records and proceedings herein, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. That Plaintiff's motion to amend his Complaint is DENIED. Plaintiff's case shall be limited to the original claim he removed from Conciliation Court.

2. This matter is set for trial on Friday, February 25, 2000, at 9:30 A.M. pursuant to the enclosed Order for Trial.

3. The attached Memorandum is part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: 1-31-00 /s/ Peter J. Lindberg
Peter J. Lindberg
Judge of District Court

MEMORANDUM

This case arises out of a dispute between Plaintiff Ronald Johnson and Defendant City of Shorewood over the price of a map Plaintiff purchased from Defendant. According to his original complaint, Plaintiff paid $300.00 more than the price he was promised by Defendant. After the trial at Conciliation Court, Plaintiff removed the case to District Court pursuant to Minn. Gen. R. Prac. 521.

On September 30, 1999, this Court heard a motion by Defendant to dismiss and a motion by Plaintiff to amend his complaint. At the hearing, Defendant argued that Plaintiff's motion to amend should be denied because Plaintiff's proposed amended complaint had taken a small conciliation court claim and expanded it into a fourteen unrelated claims. Plaintiff argued that the claims he wished to expand were related to his conciliation court claim. At that time, Plaintiff had submitted an amended complaint which made numerous claims, none of which seemed to be related in any way to the underlying conciliation claim for $300.00. The motion to dismiss was denied. With respect to the motion to amend, the Court granted Plaintiff's motion only to the extent that Plaintiff would be allowed to amend to include claims for breach of contract "arising out of the allegations in the Complaint".

At the pretrial in this matter, it became clear that Plaintiff intended to litigate numerous issues in addition to his claim for the map overcharge of $300.00. It also became apparent that Plaintiff and Defendant have already been involved in extensive litigation. Like the claims that Plaintiff now wishes to add to his complaint, these claims all relate to the use of, and water drainage onto, Plaintiff's property. After reviewing numerous court orders and Appellate Court decisions, the Court has been made aware of the substantial history of litigation between the parties. Defendant claims that all of the issues that Plaintiff wishes to bring have been previously litigated. Plaintiff acknowledges the history of his claims, but argues that the issues he now raises have not been litigated.

Without ruling on this issue, the Court is convinced that these claims are not properly dealt with in the context of this case: a removal of a small claim from Conciliation Court. For Plaintiff's claims to be brought, several additional parties would have to be added and numerous new issues would need to be plead, leaving a case that would have little if anything to do with Plaintiff's original claim. Interestingly, Judge Thomas Carey faced a very similar issue involving the same Plaintiff and the City of Minnetonka. That case, as where, involved a claim of a "continuing nuisance, i.e., unwarranted and unnecessary water flowage onto the plaintiff's land." On March 14, 1997, Judge Carey denied a motion by Minnetonka to dismiss with prejudice, but did dismiss the case, sua sponte, without prejudice. In his Order, Judge Carey articulated his reasons, stating that "I am convinced that there is a continuous issue which will survive this litigation and it must be resolved. . . . it cannot be resolved,

unless and until all the parties bearing responsibility and having the authority to remedy are brought together in a common forum." Judge Carey further noted that the City of Shorewood was necessary but unnamed party. By contrast, we are presented with a situation here where Shorewood is named, but Minnetonka is not.

This Court agrees with Judge Carey. If these parties are to finally and fully resolve Plaintiff's claims, a case must be brought that includes all necessary parties and issues. This may include both Shorewood and Minnetonka, as well as the other parties Plaintiff has claims against. The case at hand is not the forum in which to do this. At the time this motion to amend was heard, the parties had already come in for a pretrial conference. The Court will not push this case back when, in its posture as a removal from Conciliation Court, it is ready for trial. The previous Order of the Court allowing Plaintiff to amend his complaint to include breach on contract claims is rescinded as it is now clear that these do not arise out of the allegations in Plaintiff's original complaint, nor are they appropriately litigated here. Accordingly, this case will proceed to trial forthwith, with Plaintiff's case limited to his original claim relating to the map.

PJL

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

File No. PD 96-13128

Ronald R. Johnson,

Plaintiff,

vs.

City of Minnetonka,

Defendant.

ORDER AND MEMORANDUM

(Filed Mar. 14, 1997)

The above-entitled matter came on for hearing before the Hon. Thomas H. Carey, Judge of District Court, on March 11, 1997, at the Hennepin County Government Center, Minneapolis, Mn. Plaintiff appeared pro se. James Golembeck, Esq., appeared representing defendant.

IT IS HEREBY ORDERED:

1. Defendant's motion, the City of Minnetonka, for dismissal with prejudice in the above-entitled matter is herein denied.

2. The Court sua sponte is dismissing without prejudice the above-entitled matter.

3. The attached Memorandum is made a part hereof.

BY THE COURT:

/s/ Thomas H. Carey
Thomas H. Carey
Judge of District Court

Dated: March 13, 1997

MEMORANDUM

The Court is convinced that Ronald R. Johnson, as owner of substantial and valuable property in the City of Shorewood and abutting the City of Minnetonka, has raised substantial questions concerning his rights in relationship to developers in the area. However, the present status of this litigation makes resolution impossible. We are involved with the City of Minnetonka, the City of Shorewood, state aid road, and a private developer. A solution to Mr. Johnson's problems cannot be reached until the following occurs:

1. He hires an attorney who has an understanding of the law. Obviously Mr. Johnson is a very intelligent man with substantial education; however, he is attempting to represent himself and he is not doing it with much success.

2. An action be brought against all parties having rights and an interest in the issue, seeking equitable relief and abatement of what appears to be a continuing nuisance, i.e., unwarranted and unnecessary water flowage onto the plaintiff's land.

3. If necessary, an action be commenced in appropriate legal terms to secure the relief due the plaintiff, if any.

The Court wishes to emphasize that the present status of this suit shows that indispensable parties are absent, the theories of legal liability are erroneous, and serious immunity issues exist relative to the rights of the City of Minnetonka and the unnamed City of Shorewood.

At first blush, the Court normally would grant the summary judgment and dismiss this litigation once and for all. However, I am totally convinced that there is a

continuous issue which will survive this litigation and it must be resolved. Lastly, it cannot be resolved, unless and until all the parties bearing responsibility and having the authority to remedy are brought together in a common forum. I am mindful that misjoinder is not a ground for dismissal (See MRCP 21). However, Rule 19.01 clearly states: "A person who is subject to service of process should be joined as a party in the action if, A, in the person's absence complete relief cannot be accorded among those already parties." (19.01 MRCP) I am convinced that the absence of Shorewood and the contractor will make permanent resolution of this dispute impossible.

[Illegible signature and date]

March 2, 1993

Construction-Operations
Regulatory (93-02124-SF-JJY)

Mr. Ronald and Ms. Dee Johnson
P.O. Box 350
Excelsior, Minnesota 55331

Dear Mr. and Ms. Johnson:

We have reviewed the information you provided about your project to clean out a farm ditch and your request to remove an existing culvert and control structure. The project site includes wetland adjacent to an unnamed ditch that is tributary to Purgatory Creek in the N 1/2 NE 1/4 NE 1/4 Sec. 36, T. 117 N., R. 23 W., City of Shorewood, Hennepin County, Minnesota.

We believe that you may need an individual Department of the Army Section 404 (Clean Water Act) permit for this work. The proposed project appears to involve a discharge of excavated material and grading of existing spoil banks in wetland and it may affect a substantial area of wetland.

Some agricultural ditch maintenance work can qualify for an exemption from a permit, although the exemption involves strict guidelines. Generally, an exemption involves excavation that is limited to the original dimensions (depth, width, and cross section) of the ditch. Moreover, the majority of the affected wetlands must ordinarily have been farmed a majority of the time that the ditch has existed (at least 51 percent of the wetland farmed 51 percent of the time). Finally, the affected wetland must not be converted to new uses. Pasture, for example, must

not be converted to cropland, and agricultural uses must not be converted to nonagricultural uses. If you believe that the work qualifies for an exemption, please send us supporting information. If the project qualifies for an exemption, we will notify you promptly.

According to the information you provided, the proposed project appears to be further complicated by its relationship to a dam constructed by the City of Shorewood. We understand that you are attempting to reach a resolution of this situation with Shorewood and the Riley-Purgatory-Bluff Creek Watershed District. We would appreciate receiving additional information about any work that may be related to such a resolution.

If the project does not qualify for an exemption, the work may require an individual permit. Because we must notify certain other agencies about your project (through a public notice) and provide them a reasonable opportunity to comment, our review for this projects may take at least 90 days. Controversial and complicated projects may take longer, partly because we provide applicants an opportunity to review and respond to any comments we receive on our public notice. Applications that require additional information also involve delays until we can obtain the information necessary for our review. You can help expedite our review if you take the following steps:

* Fill out the application completely and specifically. Please note the enclosed instructions, although the orange booklet refers to a previous application form rather than the enclosed form.

* Provide additional information that will simplify review of the project.

* Send accurate drawings, including smaller 81/2 by 11 inch copies for our public notice. Please note the enclosed guidelines. Following them will help ensure that your drawings will be accurate and usable.

* Send a wetland delineation map, based on a delineation conducted according to the 1987 Corps of Engineers manual. A list of consultants who have indicated an interest in performing delineations is enclosed. We can also delineate the wetlands, although we may not be able to perform a definitive delineation until after the spring thaw.

* Explain the need for the project, including public and private benefits that may result from it.

* Please describe any alternatives considered when planning the project. This consideration should include other potential sites and other methods of accomplishing the desired result. Our regulations often prevent issuance of permits when there are less-environmentally-damaging alternatives available. For instance, if the project involves placing fill in a water or wetland, there may be a way to accomplish the project purpose but without filling, or without filling as large an area. Even when the project is permitted, the permit may require compensatory mitigation for any lost wetland. This mitigation may involve creation of new wetland or restoration of drained wetlands.

If your project would include any temporary placement of excavated or fill material into a waterbody or wetland, you may also need authorization for that work. Be sure to include that information in your permit application.

You may also need State, county, watershed, and/or city permits or approvals for this project, including approvals required by the State Wetland Conservation Act or

the U.S. Department of Agriculture (if you are in any Federal farm programs). Any approval or exemption from our agency does not remove the need to obtain other approvals.

If you have any questions, please contact Joe Yanta at (612) 220-0362.

Sincerely,

Enclosures

Ben Wopat
Chief, Regulatory Branch
Construction-Operations Division

[LOGO]

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
180 E. KELLOGG BLVD. ROOM 1421
ST. PAUL, MINNESOTA 55101

March 17, 1993

Reply to Attention of

Construction-Operations
Regulatory (93-02124-SF-JJY)

Mr. Ronald and Ms. Dee Johnson
P.O. Box 350
Excelsior, Minnesota 55331

Dear Mr. and Ms. Johnson:

We have received your March 15, 1993, request that we issue an exemption for your proposed ditch maintenance and that we instruct the City of Shorewood and the Riley-Purgatory-Bluff Creek Watershed District to remove road and dam fill. The project site includes wetland adjacent to an unnamed ditch that is tributary to Purgatory Creek in the N 1/2 NE 1/4 NE 1/4 Sec. 36, T. 117 N., R. 23 W., City of Shorewood, Hennepin County, Minnesota.

As stated in our March 2, 1993, letter, we reviewed the information you provided about the ditch cleanout and the requested removal of an existing culvert and control structure. With the information we have, we still believe that you may need an individual Department of the Army Section 404 (Clean Water Act) permit for cleanout. The proposed project appears to involve a discharge of excavated material and grading of existing spoil banks in wetland, and it may affect a substantial area of wetland. According to the National Wetland Inventory map and

other sources, the affected area appears to have been a wetland before the dam and road construction in the mid-1980's; and it appears to remain a wetland today.

Our earlier letter explained that some agricultural ditch maintenance work can qualify for an exemption from a permit, although the exemption involves strict guidelines. Generally, an exemption involves excavation that is limited to the original dimensions (depth, width, and cross section) of the ditch. Moreover, the majority of the affected wetlands must ordinarily have been farmed a majority of the time that the ditch has existed (at least 51 percent of the wetland farmed 51 percent of the time). Finally, the affected wetland must not be converted to new uses. Pasture, for example,, must not be converted to cropland, and agricultural uses must not be converted to nonagricultural uses. If you believe that the work qualifies for an exemption, we urge you to send us supporting information. We have no specific information that indicates an exemption is warranted for this ditch. If you provide information documenting that the project qualifies for an exemption, however, we will notify you promptly. Without such documentation, we cannot consider the work exempt.

As our earlier letter noted, the proposed project appears to be further complicated by its relationship to road and dam fill placed by the City of Shorewood. We understand that you are attempting to reach a resolution of this situation with Shorewood and the Riley-Purgatory-Bluff Creek Watershed District. We would appreciate receiving additional information about any work that may be related to such a resolution. We do not have any information that suggests we have any authority to require the city or the watershed district to remove this fill. The fill was authorized by a nationwide general permit that did not

require detailed review or agency coordination. Federal permits do not authorize any injury to the property rights of others, and the Federal Government does not assume liability for any damages caused by the permitted action or related unpermitted actions.

As also noted in our earlier letter, you may need State, county, watershed, and/or city permits or approvals for this project, including approvals required by the State Wetland Conservation Act. You should also contact the U.S. Department of Agriculture if you are in any Federal farm programs or if future owners or renters may be in any Federal farm program. Any approval or exemption from our agency does not remove the need to obtain other approvals.

If you have any questions, please contact Joe Yanta at (612) 220-0362.

Sincerely,

/s/ Ben Wopat
Ben Wopat
Chief, Regulatory Branch
Construction-Operations
Division

CC: Tim Keane
Joel Dresel
Tom Humphrey

February 7, 1994

Construction-Operations
Regulatory (93-02124-SF-JJY)

Mr. Ronald and Ms. Dee Johnson
P.O. Box 350
Excelsior, Minnesota 55331

Dear Mr. and Ms. Johnson:

We have received your October 18, 1993, letter that provided additional information about the result of your suit against the City of Shorewood concerning the berm the city constructed across a ditch that drains your property. The project site includes wetland adjacent to an unnamed ditch that is tributary to Purgatory Creek in the N 1/2 NE 1/4 NE 1/4 Sec. 36, T. 117 N., R. 23 W., City of Shorewood, Hennepin County, Minnesota.

As stated in our March 2 and March 17, 1993, letters we still believe that you need an individual Department of the Army Section 404 (Clean Water Act) permit for a cleanout of the ditch. The proposed project appears to involve an excavation in a ditch through a wetland and possibly grading of existing spoil banks in wetland, and it may affect a substantial area of wetland. According to the National Wetland Inventory map and other resources, the affected area appears to have been a wetland before the dam and road construction in the mid-1980's; and it appears to remain a wetland today.

As those earlier letters also noted, the road and berm fill was authorized by a nationwide general permit for headwaters and isolated waters that did not require detailed review or agency coordination. In many instances,

this type of permit did not even require the responsible party to notify our office before doing the work. Even though the work may have been authorized under such a permit, Federal permits do not authorize any injury to the property rights of others, and the Federal Government does not assume liability for any damages caused by the permitted action or related unpermitted actions.

Under current laws and regulations, work in this area requires a more detailed review. According to the regional conditions for the nationwide general permit, any work that may adversely affect more than 3 acres of headwaters and isolated waters, including wetlands, requires an individual permit review, unless it qualifies for exemption. The judgment of Hennepin County District Court does not exempt you from the need to obtain a Section 404 permit. However, the results of that court action and other information that you can provide are factors that we should consider in our public interest review of any permit application that you might make for a ditch cleanout.

Our earlier letters explained that some agricultural ditch maintenance work can qualify for an exemption from a permit, although the exemption involves strict guidelines. Generally, an exemption involves excavation that is limited to the original dimensions (depth, width, and cross section) of the ditch. Moreover, the majority of the affected wetlands must ordinarily have been farmed a majority of the time that the ditch has existed (at least 51 percent of the wetland farmed 51 percent of the time). Finally, the affected wetland must not be converted to new uses. Pasture, for example, must not be converted to cropland, and agricultural uses must not be converted to nonagricultural uses. As we stated in those

earlier letters, if you believe that the work qualifies for an exemption, we urge you to send us supporting information. We now have no specific information that indicates an exemption is warranted for this ditch. If you provide information documenting that the project qualifies for an exemption, however, we will notify you promptly. Without such documentation, we cannot consider the work exempt.

As we also noted previously, you may need State, county, watershed, and/or city permits or approvals for this project, including approvals required by the State Wetland Conservation Act. You should also contact the U.S. Department of Agriculture if you are in any Federal farm programs or if future owners or renters may be in any Federal farm program. Any approval or exemption from our agency does not remove the need to obtain other approvals.

For your convenience, the new joint Federal-State-Local water permit application/notification form is enclosed.

If you have any questions, please contact Joe Yanta at (612) 220-0362.

Sincerely,

Enclosures

Ben Wopat
Chief, Regulatory Branch
Construction-Operations Division

RON JOHNSON

PO Box 350
Excelsior, MN 55331

Tel: 474-8171
Fax: 938-2369

January 27, 1996

Mr. Ben Wopat
US Corps of Engineers
180 E. Kellogg Blvd., Rm 1421
St. Paul, MN 55101-1479

RE: N 1,2, NE 1,4, NE 1,4, Sec. 36, T. 117N, R.23W City of Shorewood, Hennepin County, Minnesota

Dear Sir:

Enclosed is a copy of your March 17, 1993 letter for your convenient reference.

Enclosed also is the opinion of the Minnesota Appellate court dated May 11, 1994. There was a taking of the property to elevation 914 by the City of Shorewood as of December 31, 1984. The taking was for the purpose of collection and storage of storm water as Shorewood intended in 1975. Enclosed also is a letter of opinion dated November 28, 1995 by a professional engineer and a certified soils specialist with McCombs, Frank, Roos, Associates, inc. (MFRA) who field surveyed the property. The property was not a wetland prior to the 1984 taking. MFRA was listed by the USCOE as qualified. Mr. Kepple is a wetland law specialist with Dorsey & Whitney. His group successfully prosecuted similar fact cases on behalf of landowners against regulatory agency. I am an engineering graduate of the University obtained while a Research Associate (ass't professor). My family has been in farming, construction, and land development businesses since 1921. I taught surveying during the Korean war in

the US Army (missile navigation) and did satellite reconnaissance development work for NASA (1964-7). Collectively, I believe the court, MFRA, Dorsey & Whitney and I am qualified to rebut the conclusions reached in your letter based on overly generalized and inaccurate data. As indicated, the City decided to flood the property and designated it a wetland basin in 1975. Your data appears derived from this unlawful act and designation and aerial photography and not from a specific field survey. Please issue the letter I requested 3 years ago.

In sum, in 1975 the City wrongfully decided to create a "wetland basin" on the property. The area is wrongfully shown on the City's 1979 wetland map. To create the basin, the City in 1984, under a USCOE permit, wrongfully dammed my ditch outlet. (The City, not the developer, constructed the streets and utilities for the adjoining subdivision). The trial court found the obstruction is 12 feet above my ditch bottom and concluded there was a physical taking in 1984 which caused the flooding and wet conditions. MFRA describes in detail the wrongful ditch manipulations and discharges to the site.

I had rented the property beginning in 1970; purchased it from the owner's estate in 1981. The low area was kept dry by the large ditch. The ditch self scoured. That changed in 1984 when the City damaged the ditch and the property.

The City claims the area is subject to City Wetland Conservation. (In making this assertion, the City relies on USCOE communications, in particular, with Bradley Nielsen and Ronald Peterson. Mr. Nielsen is City Planner. Mr. Peterson is an attorney and "wild life biologist"). After three reconnaissance surveys, MFRA concluded the City

imposed the restriction after the taking; the area was not a wetland before. Mr. Kepple opines legal "wetland" cannot be created by damming up an adjoining landowner's ditch without his authority. Therefore, my property did not and does not have Section 404 wetland. Please issue the disclaimer and amend your records accordingly.

The issue of the amount of damages is set to go before the jury. The court gave the City two choices: (1) end the taking and pay damages during the taking or (2) acquire fee ownership. So far, the City has done neither. Apparently the City is waiting to see what amount the jury will likely award before deciding. As indicated, the taking occurred in 1984. Any applicable regulations must be those in effect as of 1984 according to Mr. Kepple.

If you have any other questions please do not hesitate to contact me by mail or phone. If I am out kindly leave a message on my machine and I will get back to you.

Thank you for your serious reconsideration of this matter.

Sincerely yours,

/s/ Ron Johnson
Ron Johnson

[LOGO]

McCombs Frank Roos Associates, Inc.

15050 23rd Avenue North,
Plymouth, Minnesota
55447-4739

Telephone
612/476-6010
612/476-8532 Fax

Engineers
Planners
Surveyors

November 28, 1995

Mr. William J. Kepple
Dorsey & Whitney
220 South Sixth Street
22nd Floor
Minneapolis, Minnesota 55402

SUBJECT: Johnson's Shorewood Property
MFRA #10428

Dear Mr. Kepple:

McCombs Frank Roos Associates, Inc. (MFRA) visited the site and reviewed the reconnaissance report dated November 3, 1995 by Kelly Bopray of this firm. We have also reviewed Shorewood's 1967 topographic maps (OSM), its Lowland and Wetland Ordinance No. 70 dated 1973; Stormwater Study dated 1975 (OSM) referencing Ordinance No. 70; and, the City's Wetlands Map dated 1979. An OSM document dated January 25, 1982 indicates Ordinance No. 70 was still in effect at that time.

At Section 3, Ordinance No. 70 states:

> SECTION 3. DEFINITION AND ESTABLISHMENT OF WETLAND CONSERVATION AREA
>
> The wetland conservation areas within the Village of Shorewood, hereinafter referred to as the protected area, is defined and established to be the shore line of Lake Minnetonka, Galpin Lake, Christmas Lake, Lake Mary, Silver Lake, Lake

> Virginia, and the low areas adjoining any water course and drainageway or body of water subject to meandering, flowing or overflow, including areas of marsh, wooded marsh, submerged marsh, inundation areas as shown upon the attached wetlands map. Said map is hereby made a part of this Ordinance and two copies thereof shall reside on file of the office of the Village Clerk for public inspection. (Ordinance No. 70 dated March 12, 1973.)

A subsequent Ordinance, Chapter 1102, entitled, "Wetland Developments," at 1102.3 contains substantially the same language. A map captioned Nielsen August 20, 1992, Exhibit 1, bears the handwritten title, "Wetland Ordinance Map (79)," and includes the subject property. However, prior to the 1984 taking, Johnson's property would not have been a "lowland adjoining any water course and drainageway or body of water subject to meandering, flowing or overflowing." Simply stated, the subject property beyond the ditch boundaries was not a wetland and, by the language intent of the City Ordinances, No. 70 or Chapter 1102, was not subject to the terms of the Ordinance prior to the 1984 taking. The property slopes southwest to a natural drainageway through which the ditch outlet was dug (USGS & 1967 OSM topos). The scope and effect of the ditch on Mr. Johnson's property lowered the water table and eliminated surface ponding as obviously intended. (Bopray report.)

MFRA estimates that roughly 2,740 cubic yards of spoil was excavated and placed in intermittent piles along and approximately 15 feet from the ditch banks. The ditch was dug long ago as indicated by mature trees growing in the spoil and mature (10-12" diameter) stumps at the 912 contour which grew inside the ditch banks. These were

located east of the foot bridge. The ditch is indicated on the City's 1967 topography (OSM) and in the 1975 and 1985 Hennepin County aerial photos. (Peterson; Bopray)

MFRA located the original ditch crossection under and behind silt removed during the survey including the exposure of compacted dragline bucket marks. This was done at 26 locations between ditch head at station 0+00 to station 8+75, 00 feet east of the foot bridge. This could not be done in the lower reaches of the ditch without significantly disturbing the site due to built-up silty sediment. There the ditch was probed, striking logs in the silt above the ditch bottom. These locations indicated significantly lower elevations and higher ditch gradients than in the upper and mid portions of the ditch. At its head the ditch bottom is at elevation 912 and slopes to 910 at the mid point length of the ditch.

Shorewood's 1975 Comprehensive Stormwater Study (OSM) indicates the City intended to use the property as a stormwater holding basin. It recommended the City procure easements for stormwater discharges from the north (near the head of the ditch). However, due to the drainage ditch and the outlet, the property would not pond stormwater unless the outlet was manipulated.

The hydrology of the ditched lowland changed in 1984 with City construction of the Waterford Place street berm over and across the ditched drainageway. A 36" diameter culvert was placed through the berm fill at the elevation of the surface of the natural drainageway. The ditch would have been excavated below this elevation in the likely range of 902 to 904 such that the culvert inlet at 906 itself would constitute a manipulation of the ditch outlet. An OSM document dated July 3, 1984, indicates Trivesco,

developer of the south and west adjoining Waterford Subdivision, requested Shorewood to raise the culvert above the ditch bottom to create a pond or, alternately, deepen the ditch bottom. The topo and as-builts (OSM) indicate the City chose the former approach.

The culvert inlet north of the Waterford Place berm is not to daylight. A 36" diameter plugged T-section with vertical riser was added. The riser was a 6" diameter inlet at 909.98, a 12" diameter inlet at 911.40 and a 36" diameter drop inlet at 914.08 (OSM). This further manipulated the ditch outlet. During fair weather the resultant ponded water level had been observed at or near 911.5 (Waterford 2nd Addition as-built by S&M, August 28, 1986; Court Order August 17, 1983, finding No. 18; Bopray report photo near station 11+50 mid October 1995). During moderate to heavy rainfall events, events having frequencies of recurrence of less than once per year, the water level would rise to 914. The design high-water level is 917.1 (OSM).

MFRA staked the 914 contour in the ditch to its head. (Bopray photo and Existing Conditions Exhibits). The bottom of the stakes were placed at elevation 914. This is the elevation of the 36" diameter drop inlet of the City's control structure. The smaller control structure orifices at 910 and 911.5 would only provide limited capacity outlet. Simply stated, the bottom of the stakes are at the elevation to which the City substantially raised Mr. Johnson's ditch outlet. The ditch contour 914 is outside the ditch banks in the lower reaches; is at the bank top 100 feet west of the foot bridge; and is nearly at the top in the mid portion of the ditch. A taking to elevation 914 substantially eliminated the scope and effect of the ditch and would reduce the effect of the natural surface drainageway

which outlet at 908 at the property line before the ditch was dug.

In addition to manipulation of the ditch outlet, the Johnson property is impacted by run-off discharges to the site from adjoining developments. Upstream from the berm, three Waterford storm sewers (18", 21" 24" diameter) discharge. Near the upper end of the ditch, the 24" north adjoining Sandy Hills Subdivision culvert and the Vine Hill Road curb-cut/swale, across from east adjoining 1992 Ashcroft development, discharge onto the property. Run-off from these sources, backed-up by the berm and the control structure, would cause the water to rise to 914 from a 1.5" rainfall event and to 917.1 for a 6" event. (OSM and Watershed District data.) At 914 the ditch would back-up to its head and nearly to the bank tops at its mid-point. At 917.1 water would pond over and beyond the ditch banks throughout the majority of its length. The Watershed District imposed a floodplain freeboard elevation of 919.1 over the lowland, which, prior to the 1984 project, had natural drainage to 900 on the adjoining south property through the ravine. (Watershed District 1984 letter; 1967 OSM topo.)

Off-site discharges onto the property from the north and east have deposited sediment to the area and caused water to pond at elevation 917. The ponded water along the north property line resulted in washing gullies to the ditch. (Bopray report; OSM topos.) This appears to be responsible for recent north ditch bank collapses in its upper reaches. Silt from such sources ends up in the ditch and, unless cleared by adequate ditch gradient, would build up in the ditch.

In addition to manipulation of the ditch outlet elevation and discharges to the site, the ditch's hydraulic gradient has been manipulated. The original ditch gradient indicates that prior to the 1984 taking, higher water velocities would have carried silt to the City designated wetland south of Waterford. There the gradient levels off which could allow silt to settle out prior to entering the Purgatory Creek ditch. Since 1984, additional silt discharges to Mr. Johnson's site backed-up by the berm would result in more silt and lower water velocities allowing silt to settle in the ditch. A silt mound (elevation 912.6) had built-up in the lower reaches of the ditch higher than the ditch bottom elevation at the head. Water standing in the mid-section of the ditch would reduce its scope and effect. Without maintenance, silt accumulations would be expected to continue up the ditch beyond the southwest portion of the property. This maintenance task would apparently be left to the landowner, Mr. Johnson. It is reasonable to conclude that he would have to perform minor ditch maintenance through the built-up silt to, at best, utilize the limited capacity 910 and 912 control structure outlets.

A retrofit for the City's Waterford system would be unplug and extend the culvert inlet to daylight at the property line and wrap the berm completely around the pond created by the control structure. At the upper end of the ditch, a curb and catch basin retrofit on the west side of Vine Hill Road could return Ashcroft Subdivision run-off back to the existing Minnetonka storm sewer east of the road. The Shady Hills Subdivision 24" storm sewer could be extended down the slope north of the property line and buried under Mr. Johnson's land discharging directly into his ditch. Altogether, these improvements would cost on the order of $50,000 (1995).

The 1984 taking impacted the property in other ways. Sewer and water utilities in the Vine Hill Road exist and stubs to the property. However, City Ordinance disallows platting minimum lot area (20,000 square feet) inside a Wetland Conservation Area. Out of 6 available Vine Hill lots, 3 or 4 would not be plattable under this criteria; the same with 1 to 4 possible Waterford Circle lots. Trivesco proposed 4 lots and the City constructed utility stubs for 4 lots. (OSM July 3, 1984 memo and City as-builts.) The northwest parcel has been severed by the taking and the imposed Conservation Area. It is landlocked precluding development of an additional 9 lots. City Ordinance required Waterford streets brought to the property line. Where this was intended (Waterford Outlot C assessing Waterford Circle), apparent deed restrictions subsequently imposed on the outlot precludes northwest access.

Access could be provided east of the Waterford pond lateral to Waterford Place. The pond is in Waterford Outlot A owned by the City. A street would be a compatible use. If apparent deed restrictions over this outlet were modified, Mr. Johnson could import additional fill to grade a street if the City chose to extend the ditch culvert to the property line. The culvert extension bypassing the pond, could be placed under this new street. To provide access to the lots north of the ditch, the culvert could be further extended and turned northeast by Mr. Johnson to intercept the ditch east of the street crossing.

Finally, the ditched lowland had potential to be developed into hobby farm acreage. MFRA located an upland knoll centered in the lowland which would support an

agricultural building site (as outlined by Mr. Johnson) with access east and west along the ditch bank.

Very truly yours,

McCOMBS FRANK ROOS ASSOCIATES, INC.

/s/ Gregory J. Franke
Gregory J. Frank, P.E.

/s/ Kelly J. Bopray
Kelly J. Bopray, CPSS
Certified Professional Soil Scientist

ADDENDUM NO. 1

SURVEY OF DRAINAGE DITCH, SURROUNDING SOILS, VEGETATION OBSERVATIONS RON JOHNSON PROPERTY SHOREWOOD, MINNESOTA

November 19, 1996

MFRA #10428

Introduction:

This report is addendum No. 1 to McCombs Frank Roos Associates, Inc. (MFRA) reports dated November 3 and 28, 1995. These earlier reports referenced the vegetation on the Johnson site only as a side note, and concentrated on the hydrology of the site which controlled the status of the basin under various wetland regulatory programs. Additional observations and interpretations of the site vegetation is presented here as support to our conclusions on the scope and effect of the drainage ditch prior to and after the city constructed the Waterford Place berm and stormwater pond.

Historical Background:

The following general history was obtained from trials in Hennepin County District Court files No. CD2344 and 91-18099:

> *The low land basin on the Johnson property was ditched in the mid 1950's. The ditch was excavated in a northeast to southwest direction and continued off the Johnson property through a natural ravine that extended to wetland at an elevation of approximately 900 ft. At that time, the basin consisted of organic soils which supported a mixture of marsh grasses and*

mature trees. Excess water drained freely through the ditch and preventing surface ponding in the basin. The drainage ditch allowed a portion of the basin to be cultivated as evident by the old dead furrows, and the mature wooded areas were used as a pasture. Since 1972, the Johnson's have used the property as an extension of their backyard and had vegetable gardens in the rich soils of the basin.

In 1984 the City of Shorewood constructed the Waterford Place roadway berm (south of the Johnson property) across the ravine and blocked the ditch. The berm was constructed and no outlet for ditch provided in order to surcharge and compact the soils below the road crossing of the ravine. The berm remained in place for approximately one year, completely preventing any drainage of the Johnson site. An April 1985 aerial photograph shows that the berm had caused water to flood to approximately a 914 elevation, before the spring and summer rains fell. Subsequent rains caused the water levels to rise to an elevation sufficient to cause a "tractor bridge" to float down to the Waterford Place roadway berm. This bridge was replaced with the existing foot bridge at approximately the same location. The impounded water caused the ditch bank to collapse in several areas and sediment and debris filled much of the ditch. The flooding also resulted in damage to many of the mature trees in the basin, and the understory vegetation was drowned out.

Later in 1985, the roadway berm was intentionally breached to release the imponded water. A culvert was laid at the surface elevation of the ravine which was above the elevation of the original ditch through the ravine. A water control structure was attached to the north end of the culvert to create a stormwater pond immediately north of the newly constructed Waterford Place road. The control structure was designed to

create a normal water level at elevation 910 which is approximately 8 feet above the original ditch bottom at the Waterford Place road crossing. The orifices on the control structure were not maintained regularly and the water elevation remained at about 912 feet in fair weather, with average seasonal precipitation. Drainage calculations indicated that rainfall events that exceed 1.5 inches results in a pond elevation above 914 feet. The control structure raised the ditch outlet from approximately 902 feet to between 910 and 914 feet. This reduced the scope and effect that the drainage ditch had on removing water from the basin on the Johnson site.

The Johnson's filed a lawsuit in 1991 and the City of Shorewood requested the ditch and surrounding land not be cleared as evidence. MFRA became involved in this suit in 1993.

After the first trial, the Johnson's began to clear the downed trees in the ditch and removed some of the accumulated sediment. This partially restored the drainage to the basin, however these efforts were limited due to the change in the outlet elevation described above. Instead of having free flowing drainage from the site, the water control structure caused permanent ponding extending to the middle part of the ditch and ponding beyond the top of ditch banks where the ditch leaves the Johnson site. Since 1983 development in the area south and west of the property has continued and additional stormwater runoff has been routed into the City's pond. Because the pond level controls the water level on the Johnson property, the additional stormwater runoff has caused the flooding of the Johnson property to increase in frequency and elevation.

In late summer and fall of 1995, MFRA conducted additional field reconnaissance work on the site. Reports of our findings are part of the court files. MFRA

surveyed the location and dimensions of the ditch including locations where the original ditch dimensions were evident. MFRA also surveyed the location and elevation of significant features near the ditch including upland vegetation, culverts and soil boring locations. Calculations based on the Natural Resource Conservation Services (formerly the Soil Conservation Service) Scope and Effect documents indicated the original ditch dimensions were sufficient to effectively remove wetland hydrology from the entire basin. Mr. Johnson stated that prior to the damming of the ditch, it was reasonably close to its original dimensions. Several on-site observations by MFRA supports Mr. Johnson's statement. Based on this evidence, MFRA concluded that from the mid 1950's until 1984 the basin did not meet the mandatory wetland hydrology criteria and therefore was not a jurisdictional wetland.

During the trial it was questioned whether wetland hydrology was required to meet the definition of a wetland in 1984. The U.S. Environmental Protection Agencies wetland definition clearly states wetland hydrology is the key factor in determining if an area was a jurisdictional wetland. The EPA defined wetlands as " . . . those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions" (40 C.F.R. 230.3t; Dec. 24, 1980). Furthermore, the Corps of Engineers Regulatory Guidance Letter (RGL 82-2) Clarification of "Normal Circumstances" in the Wetland Definition stated " . . . we do not intent, by this clarification, to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes." These statements clearly state the Corps of Engineers policy in 1984 was

that if an area no longer meets the wetland hydrology criteria, it would not be considered a wetland.

On May 15, 1996, the U.S. Army Corps of Engineers issued a written exemption under the Clean Water Act Section 404 to conduct maintenance to return the ditch to its original dimensions. Additional correspondence between the Corps of Engineers, Mr. Johnson, and MFRA resulted in the Corps of Engineers issuing a letter of authorization on July 12, 1996 for a concept plan to re-establish the original ditch outlet by modifying the City's water control outlet structure. This concept plan would also qualify for the drainage exemption under the Minnesota Wetland Conservation Act because any wetlands that may have been re-established as a result of damming the ditch, have been in existence less than 25 years.

Vegetation Survey:

Although the jurisdictional wetland status of the Johnson site clearly hinges on the hydrology component, it appeared that our vegetation observations needed to be formalized. Below is a compilation of the vegetation observation made during several site visits.

1. In terms of making a routine vegetation analysis the dominant plants species in the basin include: Reed Canary Grass (FACW+), Common Mallow (not listed), Kentucky Bluegrass (FAC-), Common Buckthorn (FAC-), American Elm (FACW-), Quaking Aspen (FAC), and Eastern Cottonwood (FAC+). Based on the dominant species, the basin has more than 50% FAC or wetter species (4 of 7). Since the basin has been hydrologically altered, it is important to note that Reed Canary Grass, Common Buckthorn, Quaking Aspen, and Eastern Cottonwood are all pioneer species that move into

drained wetlands as well as disturbed uplands. A significant number of upland species have become established in the basin since it was drained. When all of the identified species in the basin are considered, 29 of 57 (51%) are wetland species. With the rich organic soils and more recent manipulation of the ditch outlet, the aggressive pioneer wetland species will probably never be fully replaced by upland species through natural succession. Small areas within the basin are clearly dominated by wetland vegetation where as other areas are clearly dominated by upland species but the basin on the whole is right on the border line. A list of the identified plant species in the basin is attached.

2. During the trial, there was speculation as to a grove of Tamarack (FACW) trees on the site. MFRA had observed several Tamaracks on the site concentrated about 120' south of the upland knoll in the basin. Upon further investigation, it was observed that all but a few of these mature Tamaracks were dead. The size of these trees suggested that they may have been present prior to the 1950's when the site was drained. Drainage typically results in increased growth rate of this species of trees (Bradford). Although Tamarack is a wetland species, if individual trees have physically adapted to dryer conditions and then are flooded for extended periods of time (1984 to 1985), it is reasonable to believe this could kill the trees.

3. Several important upland tree and shrub species were observed to occur regularly in the basin. Mountain Ash and Apple trees which were observed in the basin are not listed in the National List of Plant Species that Occur in Wetlands for USF & WS Region 3. American Plum, Sumac, and

Prairie Crabapple all have an obligate upland indictor status (occur in wetlands 1% or less frequently). White Oak, White Birch, American Basswood, and Black Cherry all have a facultative upland indicator status (occur in wetlands at 1 to 33% frequency). Although these species are not the dominant species in the basin, they occur more frequently in this basin than has been observed in wetlands in the area. The regular occurrence of these upland species indicated the ditch makes the site considerable dryer than indicated by the dominant species which are known to pioneer disturbed sites regardless of its wetland hydrology status.

4. Since 1993, MFRA has observed vegetable and flower gardens covering about 1 acre at various location in the basin. Most common vegetable crops including sweet corn, potatoes, beans, carrots, celery, kale, peppers and melons were observed. These crops are known to produce exceptionally well on fertile drained organic soils, but are also very sensitive to poor drainage conditions. With the exception of flood damage since construction of the Waterford Place roadway, Mr. Johnson reports consistent, abundant yields from his gardens. This again supports the conclusion that the ditch provided adequate drainage to eliminate wetland hydrology from the basin. Perennial flowers such as Peony, Monarda, Mum, Delphinium, and Poppy were planted in various locations in the basin and their continued persistence also supports the absence of wetland hydrology.

5. Buckthorn is an upland species (FAC-) and is one of the dominant species in the basin. The larger diameter Buckthorn that was established prior to the flooding in 1984 has well anchored root

systems. The root systems on smaller diameter Buckthorn are exposed at the soil surface as a result in the deterioration of the site drainage. Trees with shallow root systems are subject to more wind throw and frost heaving, which results in twisted and disturbed growth which is readily observable on the site.

6. Mr. Johnson has reported that the pasture grasses which dominated the understory were destroyed and replaced by reed canary grass after the basin was flooded in 1984 and 1985. As was discussed earlier, reed canary grass aggressively invades disturbed sites. In areas where the site has been cleaned up since 1994, the reintroduced pasture grass have been able to compete with the reed canary grass. Timothy (FACU), Brome Grass (FACU), Red Fescue (FAC-), Kentucky Bluegrass (FAC-) and White Clover (FACU) dominate these areas. Native prairie grasses were also seeded, however their populations were not sufficient to identify at this time. In the absence of dominance by reed canary grass, the understory would fail to meet the hydrophytic vegetation criteria (more than 50% FAC or wetter species).

7. Several upland weed species were observed to have become established in the basin. These species include Common Burdock (not listed), Canada Thistle (FACU), Wild Geranium (FACU), and Common Dandelion (FACU).

8. During the trial, questions were also raised as to the timing of the ditch excavation. Aerial photos clearly show the ditch was excavated in the 1950's. Observations of mature trees on the spoil piles and within the ditch banks (912.0) clearly indicates the ditch was excavated to its original dimensions in a time frame consistent with the

aerial photo review (mid 1950's) and not subsequent to the court order (1991). Minor ditch maintenance activities have been observed on the site since 1994. Additionally, the volume of the ditch on the Johnson site has been estimated at 2,700 cu. yds. It is not reasonable to assume this volume of material could be removed from the site without heavy equipment. There is no observable evidence that the overstory canopy has been cleared to allow equipment to operate along the ditch or trails or tire ruts that provide adequate access.

CENCS-OC

Garrett

April 5, 1993

Office of Counsel
Parsinen, Bowman & levy, P.A.
John F. Bonner III
100 South Fifth Street
Suite 1100
Minneapolis, Minnesota 55402

SUBJECT: Freedom of Information Act request for documents pertaining to Ronald R. or Dee L. Johnson or adjoining properties, the Riley-Purgatory-Bluff Creeks Watershed District of Hennepin County, Trivesco, Inc., City of Shorewood dam constructed in 1984-85, and documents relied on by the Corps of Engineers, St. Paul District, in their March 2, 1993, letter to Ronald R. or Dee L. Johnson

Dear Mr. Bonner:

Enclosed please find copies of documents relating to the Shorewood property of Ronald R. or Dee L. Johnson or for those properties adjacent to the Johnson property. In partial response to your request for the records noted above, the following are enclosed:

1. A copy of documents which reference Ronald R. or Dee L. Johnson.

2. A copy of those portions of maps which are applicable to the Johnson property: National Wetland Inventory Map, Metro Wetland Inventory, Hennepin County Soil Survey, and the Minnesota Department of Natural Resources Inventory Map.

3. A list of possible nearby permit actions where those records with an ID number 1986 or older have been destroyed, as well as a copy of file 199201957 Highland Villa Builders, Inc., Stratford Wood III, referenced on this list, that may be an adjoining property.

4. A copy of section 1344 of the Clean Water Act.

Pursuant to 33 CFR section 518.84(b) the cost for your search is:

Search – ½ hour/GS11 at $25/hour	$12.50
Duplication – 47 pages at $.15	7.05
Review – ¼ hour/GS9 at $25/hour	6.25
Total cost of search	$25.80

No records were found for the following requested documents: documents between the Corps of Engineers, St. Paul District, and the Riley-Purgatory-Bluff Creeks Watershed District of Hennepin County or Trivesco, Inc., or the City of Shorewood. Since a "no records" response was held in *Oglesby v. Department of the Army*, 920 F.2d 57 (D.C. Cir. 1990) to be a denial, this letter constitutes a denial of that portion your request.

An appeal of this denial must be made within 45 days to U. S. Army Corps of Engineers, North Central Division, Attention: CENCD-OC/Mr. George Coil, 111 North Canal Street, Chicago, Illinois 60606-7205. Mr. Coil may also be reached at (312) 353-5654.

Should you have further questions, please contact Ivette D. Garrett at (612) 220-0499.

Sincerely,

Edwin C. Bankston
District Counsel
Garrett OC /s/ [Illegible]

Enclosures
cf: George Oil, CENCD-OC

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
ARMY CORPS OF ENGINEERS CENTRE
190 FIFTH STREET EAST
ST. PAUL, MN 55101-1638

[LOGO] REPLY TO
ATTENTION OF

March 28, 2002

Office of Counsel

SUBJECT: Freedom of Information Act Requests for information on relating to Section 404

Mr. Ronald Johnson
5355 Shady Hill Circle
Shorewood, Minnesota 55331

Dear Mr. Johnson:

Pursuant to your above referenced Freedom of Information Act (FOIA) requests dated November 8, 2001, December 3, 2001, January 4, 2002 and March 31, 2002, enclosed are the documents we have that we feel may be additional information responsive to your requests. If you are looking for other information we have not included, please submit another Freedom of Information requesting specific or detailed listing.

Your request for a permit file log information is not something our Regulatory Department uses. I have provided you with a list, which could be considered a log. Also, we do not have written records of when the 1984 nationwide permit files were purged. Our Records Management Officer has no records of the destruction. A person, who is now deceased, had originally kept those records, but after she died, the records may have been lost or thrown away,

which would have been prior to you 1993 contact with our Regulatory Branch about the 1984 road project.

If you still feel, that we have records that we have not provided you, please feel free to send us an Administrative Appeal to the following address:

If you wish to appeal this as a partial denial, you must send your appeal in sufficient time to reach the Secretary of the Army no later than 60 days from the date of this letter. Send your appeal to the U.S. Army Corps of Engineers, St. Paul District, Attention: CEMVP-OC, 190 Fifth Street East, St. Paul, Minnesota 55101-1638.

Pursuant to 32 CFR § 286.33, the costs of search, duplication and review fall within the scope of our automatic fee waiver. Therefore, there is no charge.

Sincerely,

/s/ Georgia L. Stanonik
Georgia L. Stanonik
Legal Assistant

Enclosures

CENCS-CO-R 19 October 1993

MEMORANDUM FOR CO-R (BEN), CO-R/WESTERN (MICK), AND OC (STEVE A.)

SUBJECT: Request for Information on Adath Jeshurun PDN (93-07184-JJY) and Request for Jurisdictional Clarification on the Johnson Ditch Cleanout (93-2124-JJY)

1. Enclosed are copies of the Adath Jeshurun PDN that someone has requested, plus a typical recent PDN (93-6598-JJY) notification and recommendation package). Can we send out Adath Jeshurun (and other PDN's) to the public?

2. Also enclosed is our latest letter from Ronald and Dee Johnson (93-2124-JJY). They have won their suit against the city. The city apparently did more work than they told us they were going to do int 1984, but the NWP would have allowed that. Therefore, I don't think we have a permit violation. The Johnsons also want to clean out their ditch, but I think what we said in our earlier SF letter still holds true. However, what do we do if the city is forced to take out the ditch plug? Also, does the possible illegality of the plug affect our jurisdiction in any way?

JOY YANTA
Project Manager

Enclosures

Reference: RGL 82-02

Subject: WETLANDS

Title: CLARIFICATION OF "NORMAL CIRCUMSTANCES" IN THE WETLAND DEFINITION

Issued: 02/11/82 Expires: 12/31/84

Originator: DAEN-CWO-N

Description: DEFINES NORMAL CIRCUMSTANCES, CONVERTED WETLANDS, AND ABNORMAL PRESENCE OF AQUATIC VEGETATION

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1. This letter will serve as guidance regarding Corps policy on land-use conversion as it concerns regulatory jurisdiction. Specifically, the guidance addresses situations involving changes in the physical characteristics of a wetland which cause the area no longer to be a part of "waters of the United States" for purposes of the Section 404 regulatory program.

2. The current definition of "waters of the United States" delineates "wetlands" as follows, at 33 CFR 323.2: the term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

The regulations now in force cover the actual discharge of dredged or fill material into "wetlands," as they are a part of the "waters of the United States." However, these regulations do not discuss what effect the conversion of a

wetland to other uses (i.e. agricultural) has upon regulatory jurisdiction, once the land-use conversion has been accomplished.

3. Nonetheless, the preamble to the current (1977) regulations does indicate some basic parameters of the intended scope of regulatory jurisdiction. In discussing the newly revised definition of wetlands, the preamble contains the following statements, at p. 37128 of the Federal Register vol. 42, no. 138:

Our intent under Section 404 is to regulate discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation.

Furthermore, the following remarks are made in reference to the substitution of "under normal circumstances" for "normally" in the new definition:

We do not intend, by this clarification, to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes.

The discussion on the definition of wetlands concludes with these observations, at p. 37129:

Finally, to respond to those who expressed concern that our definition of "wetlands" may be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation, we have listed swamps, bogs, and marshes at the end of this definition to further

clarify our intent to include only truly aquatic areas. (emphasis added).

4. It is important to note the following qualification found at p. 37128 of the Federal Register vol. 42, no. 138:

The use of the word "normally" in the old definition generated a great deal of confusion. The term was included in the definitions to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation. Several such instances of destruction of aquatic vegetation in order to eliminate Section 404 jurisdiction actually have occurred. However, even if this destruction occurs, the area still remains as part of the overall aquatic system intended to be protected by the Section 404 program. Conversely, the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program. (emphasis added).

This policy remains in effect, regardless of the substitution of "under normal circumstances" for "normally."

5. Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such "natural circumstances" are not what is meant by "normal circumstances" in the definition quoted above, "Normal circumstances" is determined on the basis of actual, present use of an area. Thus, it is the Corps' policy that once a wetland area has been converted to another use which alters its wetland characteristics to where it is no longer a "water of the United States," that

area will no longer come under the Corps' regulatory jurisdiction. However, if the area is abandoned and over time in fact reverts to "wetlands" meeting our definition at 33 CFR 323.2(c), then the Corps' regulatory jurisdiction has been restored.

6. This policy is applicable to Section 404 authority only, not to Section 10.

7. This guidance expires 31 December 1984 unless sooner revised or rescinded.

FOR THE COMMANDER: